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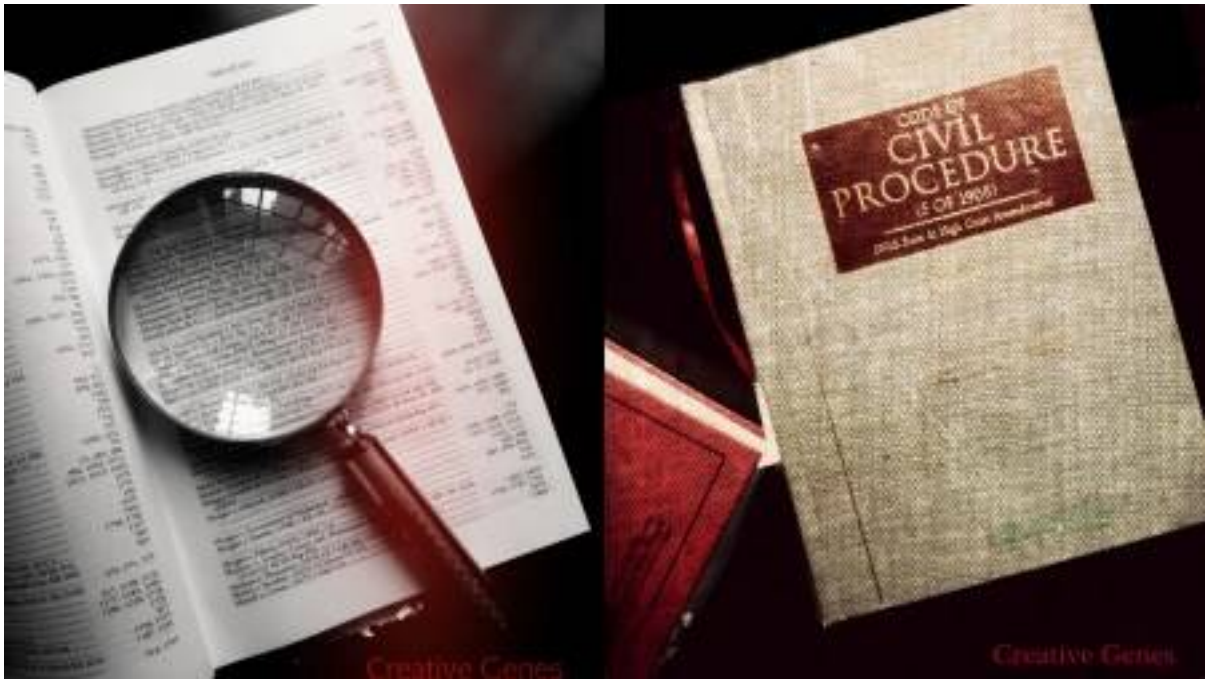

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PLIGHT OF WIVES ABANDONED BY NRI GROOMS: A NEED FOR INTERVENTION[1]

ABSTRACT

In contemporary Indian society, there are varied human rights issues that the women confront every day. Among these, one important issue that needs to be addressed with greatest concern is the abandonment of married women by Non Resident Indians (NRI's) and their families. This problem is increasing in greater proportion due to increase in the number of younger people moving abroad in search of better opportunities of employment.

The problem of abandonment is multi-dimensional. It is not a problem restricted to any particular region as cases of abandonment of brides by their grooms have been reported from various states of India. Although, this problem is more significant in few states particularly Punjab and Andhra Pradesh.

The victims of such fraudulent marriages may belong to any social strata but various studies undertaken on the present subject have indicated that most often the victims belong to the middle class and rural background. In the paper the author will try to elaborate the multiple reasons responsible for this.

The problem of desertion is assuming such an enormous magnitude in our society that it is imperative to study various issues concerning it. Through the present paper the author will make an attempt to understand the problem of abandonment, its causes and effects and to identify the areas of policy interventions that could help to alleviate the problems of abandoned married women.

Introduction

In contemporary Indian society, there are varied human rights issues that the women confront every day. Among these, one important issue that needs to be addressed with greatest concern is the abandonment of married women by Non Resident Indians (NRI's) and their families. This problem is increasing in greater proportion due to increase in the number of younger people moving abroad in search of better

[1]Divya Pandit,Research Scholar, Centre for Human Rights and Duties, Panjab University.

opportunities of employment.

In India, women are abandoned by theirNRI husbands and/or in-laws due to various reasons that arise due to the matrimonial relationship between them. Some of the reasons are non fulfillment of demand for dowry, not being able to give birth to a male child, extra marital affair of the husband and so on.

Abandonment or desertion of married women in India is a growing form of violence against them. Many married women in India face violence in its various forms and desertion by husband or in laws is another manifestation of this ever-increasing phenomenon.

The problem of abandonment by NRI grooms is multi-dimensional. It is not a problem restricted to any particular region as cases of abandonment of brides by theirNRI grooms have been reported from various states of India. Although, this problem is more significant in few states particularly Punjab and Andhra Pradesh.The victims of such fraudulent marriages may belong to any social strata but various studies undertaken on the present subject have indicated that most often the victims belong to the middle class and rural background. It is pertinent to find out the reasons responsible for such a trend.

Once abandoned, women are left with no other option but to fend for themselves. Post desertion, women face a number of challenges and are left alone to deal with the harsh realities of life that unfold before them due to desertion. Some of these challenges are non-acceptance of abandoned women in our society that is deeply rooted in patriarchal structure, identity crisis, financial insecurity to carry on with the life's daily expenses, burden of bearing the expenses of education and marriages of children, arrangement for expenses for legal recourse, facing social stigma attached to abandonment to list a few.

Surrounded by such difficult circumstances, deserted women do not have many safeguards available at their disposal. One possible reason is that deserted or abandoned women are not considered a separate entity unlike widows or divorced women that are recognized by our legal system.

The problem of desertion is assuming such an enormous magnitude in our society that it is imperativeto study various dimensions related to the issue of abandonment and give suggestions for ensuring a protective environment to such women thereby protecting their human rights.It is important to understand the nature of the problem of abandonment, discuss the multiple reasons responsible for it, analyze the effects of abandonment on women and thereafter identify the areas for policy interventions that could help to alleviate the condition of abandoned married women.

Meaning of NRI Marriages

Even though this is a gender neutral term, typically the 'NRI Marriages', as generally understood, are between an Indian woman from India and an Indian man residing in country (an

'NRI') or as citizen of that other country (when he would legally be a PIO – Person of Indian Origin). iv)

Factors Responsible for the Abandonment of Women Married to NRI's

In the recent past, many cases of women being abandoned by their NRI's spouses has come to light in our country.Such cases are reported from all the states but a large number of such cases of abandonment are reported from the states of Punjab and Andhra Pradesh. This is due to the fact that a large number of young people are constantly moving abroad for seeking better employment opportunities thus ensuring a better future for themselves as well as their families. Such NRI's living abroad prefer an Indian girl for marrige due to cultural similarities. But sometimes these marriages are fraudulent that leads to the abandonment of women. Some of these factors that lead to their desertion are listed below :

- In the lure of sending their daughter abroad, the parents do not hesitate to pay huge sum of money as dowry, both before and after marriage, when they fail to give the desired money. Their daughters are later deserted or divorced by NRI grooms for non fulfillment of their demand of dowry.
- Families sometime totally ignore even the common cautions that are observed in traditional matchmaking. In the haste of getting their daughters married to NRI grooms, the families ignore even the most visible signs of greed.
- The women who go to their husbands' home in the other country only to be brutally battered, assaulted, abused both mentally and physically, malnourished, confined and ill-treated by them in several other ways. They are therefore either forced to flee or are forcibly sent back.
- Sometimes woman after marriage go to the country of their husband's residence only to find out on reaching therethat the husband is already married to another woman, whom he continued to live with. In this situation, when the woman opposes his earlier marriage, iseither subjected to torture or is sent back and deserted.
- In some cases, discord occurs between couples when the woman after her marriage come to know that her NRI husband has given false information of his job, immigration status, earning, property, marital status and other material particulars, to con her into the marriage.Such disruptions in marriage usually result in abandonment of woman.

Governmental Interventions

The government has paid attention to the growing menace of abandonment of women and thus has taken various steps to encounter the issue. Some of the interventions are discussed below:

- Government has created NRI commission, constituted NRI cells, at the state (where the problem is serious) as well as the central level, to facilitate flow, legal assistance and other necessary action.
- The Ministry of Overseas Indian Affairs (MOIA), through its guidance booklets, has tried to focus attention on the issue which deserves serious attention. It sets out the legal rights and obligations that govern such marriages.
- Commission for Women (NCW), the coordinating agency at the National level for dealing with the issues pertaining to NRI marriages has brought out some print material which describe the problem related to NRI marriages and suggests precautionary do and don'ts for Indian women considering marriage to a NRI.
- Besides this, Government of India has also launched awareness programmes regarding this problem.
- State governments have also launched a wide publicity through various channels to educate the rural peasantry.
- NGO's are also playing very active role in educating the people regarding the risk they are taking if they enter into such alliances without proper verification.
- The Government of India has made it mandatory for NRI Indians to fill up a marriage registration form and provide information like social security number, passport details and labour ID cards details. False declarations in these forms attract punishment under IPC.

Although government has taken a number of steps for the protection of women who are victims of abandonment, a lot needs to be done as a large number of women still continue to fall in the trap of such fraudulent marriages.

Suggestions And Recommendations

Some suggested solutions which are pertinent to deal with the problem of abandonment are as following:

- The Registration of girl's marriage with the NRI under the Hindu Marriage Act with other respective Marriage Act in other religions should be made compulsory. The Government should

setup an agency to undertaken the compulsory registration of all inter country/NRI/foreign marriages.

- Ex-parte divorces taken by NRIs from courts abroad should not be recognized or legally binding in India. The Central Government should bring legislation on the lines of recommendations of the Apex Court.
- The Indian government should enter into bilateral agreement with countries having a large Indian diaspora to take criminal action against offenders on the basis of reciprocity, especially Section 44A of CPC and Section 3 of Maintenance Orders Enforcement Act of 1921 and Section 13 of CPC. Such agreement would enable recognition and enforcement of foreign divorce decrees, maintenance orders, child custody and other foreign orders.Only enacting appropriate NRI laws, making corresponding procedural rules to implement them and vesting authority in competent court to adjudicate NRI disputes will provide an effective remedy.
- NRIs will be protected to extradite because India is not member of the Hague Conference on Private International Law.
- There is need to examine the feasibility of invoking the provisions of Extradition Act, 1962. Section 20 provides for return of any person accused of or convicted for an extradition offence, from foreign country to India.
- Police and judiciary needs to be sensitized towards this serious social issue of abandonment of married women by NRIs. This would go a long way in providing support and humanitarian treatment to victims and ensure speedy judgements of such cases of violence against women.
- Media can also play an important role by highlighting adverse effect of marrying NRI in a hurry without adequate verification as this could lead to perpetual social and economic poverty.
- There is need to examine the feasibility to recognize “Irretrievable breakdown of Marriage” as a ground for divorce subject to safeguards.
- Creating a NRI commission, constituting NRI cells, deputing designated authorities for NRI problems and forming special NRI committees are not the solution without having statutory sanctions.
- The importance of antecedent verification, awareness of women’s matrimonial rights, maintenance rights, dowry law and information about passport and visa procedures should be made available and regular awareness campaigns should be conducted to make people aware of these frauds.

- The strict legal measures need to be taken to provide relief to the married women deserted by their NRI husband(s).
- The parliament is in dire need to enact new laws or amend existing laws to define the NRI problems and prescribe solutions. One single comprehensive legislation on matrimonial issues is demand of hour, which if ignored will affect numerous lives in the country.

Conclusion

Walk-in marriages and walk-out divorces are very common and acceptable in western world. But for Indian girls, facing such a situation is very difficult. From the above facts,it has been observed that abandonment of women married to NRI'sin India and the victims of domestic violence by the husband in other countries need immediate attention from policy makers, government and legislations to protect their rights. By enhancing the status of a married women through her entitlement to right of maintenance, right of inheritance and right of equal share in the property of her-in-law/husband by way of statutory provisions will bring about not only evolutionary but also revolutionary changes, which alter her status from a socio-economic liability to a socio-economic asset

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GLOBALISATION AND SAFE FOOD: A CHALLENGE FOR FARMERS[1]

ABSTRACT

Food Security is the state of having reliable access to sufficient quantity of affordable, safe and nutritious food. Toensure safe food to everyone and end hunger, there is a need to have a system which is able to produce and ensure food to all i.e. food security. These days food security is itself a challenge. This challenge is highlighting another concern these days i.e. not only security of getting access to food but that food also be safe to consume. But with the changing environmental conditions the status of food security is declining in almost all the countries and specifically the developing countries. The right to food is not secure to the most of the people including the farmers itself, who are the producers of the food.As the production is less and the population is more, people are not able to have access to even two meals a day. With the expanding population, the production is also required to increase, due to which the need to adopt different pattern of farming emerges. Therefore, to fulfill this, the traditional way of production has been dropped. The agriculture is making a shift from traditional to chemical methods. The Green Revolution was even introduced with the same motive to have more production, which can feed the mouths around. But this Green Revolution brought along the methods, which are not producing safe food. Hence, the need is not only right to food but right to safe food.Thus, this paper is an attempt to understand the concept of food security from the view of farmers as a challenge to grow safe food.

Introduction

Food is a fundamental existential need. The fats, proteins, minerals and other nutrients contained in food can be artificially produced using industrial methods. However, eating is also a pleasure, allowing us to experience flavours.

[1] Isha Jain, Research Scholar, Centre for Human Rights and Duties, Panjab University, Chandigarh.

Due to the political and social changes which have taken place over the past years, the foodstuffs market has changed out of all recognition, with a huge and varied range of products available to consumers.

Both consumers and retailers have many different expectations with regard to the value and quality of purchased products, not just in terms of price.Meeting such expectations represents a major challenge for farmers.

It should be noted that in modern societies food products mostly originate from farms, either as raw materials or having undergone various processes (standardising, preserving, processing, etc.) In developed countries farmers are not involved in processing agricultural products, which is entirely the domain of the food processing industry.

Pesticides arc critical inputs in agriculture in that they protect crops from depredations from pests and diseases. However. pesticides are toxic substances and are likely to leave behind traces in crops which may be in excess of the Maximum Residue Limits, if applied in an indiscriminate and unapproved manner. Pesticides are therefore subjected to rigorous evaluation at the time of registration and specific conditions for application are clearly spelt out. If the methodology for pesticide application on crops is followed in accordance with the instructions on labels and leaflets of pesticide containers, the likelihood of discovery of pesticide residues in crops above the safe limit become virtually nonexistent.

In recent times, reports are being received from some parts of the country regarding indiscriminate use of pesticides in disregard of approved methods of application. As a consequence, residues are being discovered, particularly in crops like fruits, vegetables, spices etc. which are sometimes in breach of the safety limit. Such residues can have a deleterious effect on human health and is therefore, a cause for public concern.

Consumers Demand

In making choices, informed consumers often look for proven quality, as reflected in reliable and measurable food safety and hygiene data.However, they are also influenced by other factors, and

attach increasing importance to less measurable aspects of quality.Consumers appreciate foodstuffs produced on the basis of historical and traditional methods compatible with environmental protection and animal welfare.

The consumers of food products are well aware of the benefits of the common market, and above all expect farmers to produce safe food at reasonable prices.Market research has identified a wide range of consumer preferences reflecting personal, socio-economic, educational, cultural, religious, biological and psychological factors.The consumers are increasingly looking for food which is not only healthy and safe but also comes with additional guarantees relating to production conditions and methods.For consumers, product certification schemes guaranteed by external monitoring authorities back up the information displayed on labels.Numerous problems and threats arising in relation to food and animal fodder have resulted in wide public awareness of food safety issues.Today's consumers, especially those who are well off, expect food products including raw materials to meet their expectations of flavour, while being authentic and produced in a traditional way.One of the things they appreciate is farming methods which respect the environment and ensure animal welfare. Food produced on the basis of historical and traditional methods is gaining in popularity.

This trend is reflected in increased demand for high-quality products using special production methods, with unusual ingredients, or originating from a specific area.

Farmers Perspective on Changing Trends of Market

The greatest challenge is to compete on global markets while meeting consumer needs. The needs of the market are diverse and constantly growing in number.The farmers should see these expectations not as a burden but as an excellent opportunity to earn more money by supplying consumers with high-quality products having a clear market identity. In the context of agricultural overproduction on global markets and stagnating or even slowly declining consumption, high-quality health products may have a competitive edge. Participation by farmers in quality schemes ensures high-quality food products at the same time as providing consumers with information on product characteristics and origin and guaranteeing relevant

production methods. Quality certification schemes help to build trust between purchasers and suppliers given that compliance is confirmed by an independent certifying authority.

One of the most important such schemes is for the certification of organic food. Given concerns about the presence of pesticide residues in plant products, Genetically Modified Organisms (GMOs) and other forms of contamination, there is slow but steady growth in the volume of organic agricultural products, and a large number of loyal customers. This has initiated a high demand for the organic food. The consumers demand for the same is increasing day by day. Though the consumers looking for organic food are majorly the ones who can afford it. As currently, the organic food is available at high cost. Though there are initiatives from various non-governmental organisations and government to provide subsidies so that the cost becomes lower. Despite production subsidies, organic farming is not yet profitable, partly due to marketing problems. But gradually with time, the demand will be among all people and hence, will have better popularity.

Despite production subsidies, in Poland organic farming is not yet profitable, partly due to marketing problems. Due to GMOs and use of pesticides, people are suffering from a lot of health problems among which cancer is the most common. Hence, the inclination for self-production (like kitchen gardens at home) and organic food markets is increasing day by day.

Many countries are experiencing rapid growth in land area cultivated using environmentally friendly integrated production methods, ensuring higher standards of the resulting products. It should be emphasised that it is extremely important for certification schemes to include the widest possible range of raw materials with full traceability of the original raw materials from farms through processing to the final product manufactured in an industrial environment.

Surveys show that many consumers are influenced by preferences for products sourced from a particular area associated with high quality; in view of this, identifying regional brands can – when supported by extensive advertising campaigns – help to achieve substantial growth in sales of local specialities.

"More and more often, people like to eat food with names invoking regional traditions.Products perceived by consumers as traditional or regional are becoming increasingly popular."

Production of traditional and regional specialities represents an opportunity for farmers from small family farms and our region to achieve individual goals and improve their quality of life.As an example, processing agricultural raw materials at the level of individual farms and producing regional and traditional foodstuffs may help small farms – which at the same time could become attractive holiday destinations for tourists/consumers – to survive and develop.

At the same time as activating farmers, it is also important to involve local authorities; they should launch and co-finance initiatives to promote their regions,given that information campaigns are needed to raise consumer interest in regional products and develop an identity for them.As a result of such campaigns, consumers are aware of the characteristics of traditional or regional products – traditional production methods, specific place of origin or the use of natural ingredients – and are willing to pay more for them than equivalent "industrial" products.

More and more often, consumers are purchasing not only local and traditional specialities or organic products, but also conventional farming products direct from producers.Direct sales shorten the route from farm to fork and are seen as helping to strengthen the finances of smaller farms.At the same time they enable consumers to purchase fresh products at lower prices.Such prices are based on production costs and do not include warehousing costs, wholesaler margins, transport costs, advertising costs, retailer margins, rental of commercial premises, employee salaries, etc.The popularity of such sales reflects the social needs of both farmers and consumers.In view of this, local markets should also be supported by governments and local authorities, even though they are not the main channel for food sales.

Impact of Globalisation on Farmers

Globalization, at current scale, is rather a recent trend in the long history of mankind, even though there are some scholars arguing that globalization started with the sailings of Christopher Colombus and Vasco da Gama in the late 15th century. With the development of transportation,

and followed by the explosive advancement of information and communication technologies, globalization came to be one of the most powerful trends in history. Globalization is an on-going phenomenon, leaving no single human being without being exposed directly or indirectly.

Globalization comes to the agricultural sector in several forms. Among them, most important are the `multilateral trade negotiations' through the World Trade Organization (WTO), `bilateral trade negotiations' through various individual Free Trade Agreement (FTA), foreign direct investments (FDIs), and the expansion of global food enterprises.

All trade negotiations aim at a freer trade. It is natural to expect that the multilateral- and bilateral-trade negotiations will open the market by tariffication which is followed by tariff-cuttings. Another important form of globalization is the expansion of global firms. In terms of agriculture and food sector, the global firms exercise their power at three stages of the food chain: seed, grain, and food market.

Hence, Globalisation is the term used to describe the recent impact of innovations in communications and transport systems on trade and the growing interdependence of countries due to economic development and economic output.

The nations have to reduce the high levels of protection between trading blocks of countries and to adopt policies to liberalise their economies in order to increase their volume of trade, including trade in agricultural products. It has been proved that, for many countries, increased economic liberalisation and openness leads to growth. It is also recognised, however, that for some countries and for some communities within countries the transition from a protected, centrally controlled economy may bring with it serious, negative, and short term consequences.

Past efforts to analyse the effects of globalization on smallholders often failed to reflect the complexity of households in newly commercializing rural economies; notably the integration of production and consumption decisions, the multiplicity of goals and averseness to risk. Most smallholder households produce partly for sale but mainly for their own consumption. Equally, they purchase some inputs (fertilizer, seeds and hired labour) and provide some from other enterprises or their own resources (e.g. family labour). Any changes in agricultural policies such

as those advanced through SAPs, will affect not only smallholders' production, but also their consumption and labour supply. Consequently, it is useful to consider different categories of smallholders, including various combinations of cash crop producers, food surplus/deficit producers, net food consumers/buyers and mixed crop/livestock farmers.

Impact on Farmers:

1) Grants distributed on large scale by the developed countries- Before the reductioningrants by WTO, developed countries had distributedgrants on large scale. They had grown the amount ofthe grants on large scales in agriculture during 1988-1994. So they have not to face many difficulties if thereis a reduction in grants.
2) Small production field-InIndia 60% of population depend on agriculture. Thepressure on agriculture is increasing because of theincreasing population. Possession of land is small andso the production cost is higher. There is also theproblem of standard etc. So there are unfavorable impact occur on Indian agriculture.
3) Intellectual property right- Intellectual property right cause unfavorable impacts on Indian agriculture. Multinational companies can easily enter in the field of agriculture and it will be bad for the margin farmers.
4) Increasing production expenditure and low cost of goods- farmers are being bankrupt because ofgrowing production expenditure, costly seeds, on the one side and reducing prices of goods on the otherside. He doesn't let out of it and so he is committing suicide. This can be one of the impacts of agriculturalagreement.

Conclusion

Farmers are in a position not only to supply consumers with the food they need but also to meet even their most exacting demands.The role of governments and the Community is to influence consumers and producers in order to raise awareness through education, promotion of good eating habits and dissemination of best practices, as advocated in the Green Paper on agricultural product quality.

The benefits of globalization, regardless of the size, are scattered usually over time and economic entities. The costs of globalization, in contrast, usually, appear to be concentrated on certain entities-those group not ready to exploit the changing environments. It is an important role of government to even out the benefits and costs, using tax and subsidy as policy measures.

Since globalization comes as such a full-scale, massive trend, it is not possible for the governments to counter the movement. Also, since income growth and urbanization take place with the wave of globalization, it is difficult to separate the net impact of globalization. Globalization, coupled with the income growth and urbanization, results in bi-polarization. In most cases, subsistent family farms and low-income urban residents compose the low-end of the polarization. The urban-rural divide tends to be larger as the impact of globalization. As the agricultural-sector responds to the market opening, Governments try to compensate the direct and indirect economic damages incurred by the freer trade and also pursue `structural adjustment' measures to buy-out the rights to farming.

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CHILD MARRIAGE AND LAW IN INDIA[1]

ABSTRACT

Child marriage in India has been practiced for centuries, with children below the age of 18 years, married off before their physical and mental maturity. Child marriage affects both boys and girls, though the overwhelming majority of those affected are girls, most of whom are in poor socio economic situations. Child marriage is related to child betrothal and forced early marriage because of the pregnancy of the girl. In many cases, only one marriage-partner is a child, usually the female.

Child marriages are also driven by poverty, bride price, dowry, cultural traditions, law that allow child marriages, religious and social pressures, regional customs, fear of remaining Unmarried , illiteracy, and perceived inability of women to work for money. The problem of child marriage in India remains rooted in a complex matrix of religious traditions, social practices, economic factors and deeply rooted prejudices. Regardless of its roots child marriage constitutes a gross violation of human rights, leaving physical, psychological and emotional scars for life. Sexual activity starts soon after marriage, and pregnancy and childbirth at an early age can lead to maternal as well as infant mortality. Moreover, women who marry younger are more likely to experience domestic violence within the home. This paper is an attempt to eradicate the child marriage in India and also to focus the Laws meant for curbing the child marriage all over India.

Keywords: Child Marriage, Prohibition, Laws.

Introduction:

Child marriage in India, according to Indian law, is a marriage where either the woman is below age 18 or the man is below age 21. Most child marriages involve under age women, many of whom are in poor socio-economic conditions. Child marriages are prevalent in India.

[1]Renuka Sasanamari, Assistant Professor of Law, Government Law College, Holenarsipura.

Estimates vary widely between sources as to the extent and scale of child marriages. The International Center for Research on Women - UNICEF[1] Publications have estimated India's child marriage rate to be 47% from small sample surveys of 1998, while the United Nations reports it to be 30% in 2005. The Census of India has counted and reported married women by age, with proportion of females in child marriage falling in each 10 year census period since 1981. In its 2001 census report, India stated zero married girls below age 10, 1.4 million Married girls out of 59.2 million girls in the age 10-14, and 11.3 million married girls out of 46.3 Million girls in the age 15-19 (which includes 18-19 age group) since 2001, child marriage rates in India have fallen another 46%, reaching an overall nationwide average 7% child marriage rates 2009.

Jharkhand is the state with highest child marriage rates in India (14.1%), while Kerala is the only state where child marriage rates have increased in recent years, particularly in its Muslim Community. Rural rates of child marriages were three times higher than urban India rates in 2009. Child marriage was outlawed in 1929, under Indian law. However, in the British colonial times, the legal minimum age of marriage was set at 15 for girls and 18 for boys. Under protests from Muslim organizations in the undivided British India a personal law. Shari at Act was passed in 1937 that allowed child marriages with consent from girl's guardian . After Independence and adoption of Indian constitution in 1950, the child marriage act has undergone several revisions. The minimum legal age for marriage, since 1978, has been 18 for women and 21 for men.

The child marriage prevention laws have been challenged in Indian courts with some Muslim Indian organizations seeking no minimum age and that the age matter be left to their personal law. Child marriage is an active political subject as well as a subject of continuing cases under review in the highest courts of India. Several states of India have introduced incentives to delay marriages. For example, the state of Haryana introduced the so-called Apni *Beti, ApnaDhan* program in 1994, which translates to "My daughter, My wealth". It is conditional cash transfer programme dedicated to delaying young marriages by providing a government paid Bond in her name, payable to her parents, in the amount of ₹25000 after her18th birthday if she is not

[1]ICRW is a non profit organization headquartered in Washington D.C United States, with a regional office in New Delhi,India. It has project offices in Mumbai and Hydrabad. It works to promote gender equitable development within the fields of international development.

married.[1]India had the highest number of unregistered children under age five between 2000 and 2012 and the second-highest number of child marriages, according to a U.N. report which said the country still needs to improve immunization coverage and stop gender-based sex selection.

The report "Improving Children's Lives, Transforming the Future — 25 years of child rights in South Asia" by the United Nations' children agency, UNICEF, analyses the progress made over the last quarter century on key issues that directly affect the lives of children in the region. At 71 million, India had the largest number of children under the age of five whose births were not registered between 2000-2012. The report said that birth registration levels in South Asia have increased since 2000, but progress has been slow. India, along with Afghanistan, Bangladesh and the Maldives, has been recording "significant improvements" in birth registration but about 100 million children in the region are still not registered at birth. India has the greatest disparity between the poorest and richest households with children in the poorest households being three times less likely to be registered than those in the richest.

Definition of Child Marriage:

Child marriage is complex subject under Indian law. Child marriage, defined as marriage of a child under 18 years of age, is a silent and yet widespread practice. Child marriage has been referred to as early marriage or child brides, but these terms are not optimal. Early marriage does not imply that children are involved, and the term is vague because an early marriage for one society may be considered late by another. The term child brides glorifies the tradition by portraying an image of joy and celebration. Most of these marriages are arranged by parents, and girls rarely meet their future husband before the wedding. The girls know that after the wedding they will move to their husband's household, become the responsibility of their in- laws, and might not see their own family or friends for some time.

UNICEF defines child marriage as marriage before 18 years of age and considers this practice as a violation of human rights. The harmful consequences of child marriage are segregation from family and friends, limiting the child's interactions with the community and peers, lack of opportunities for education. Girl children often face situations of bonded labour, enslavement,

[1]http//en.wikipedia.org/wiki/Child_marriage_in _India

commercial sexual exploitation and violence as a result of child marriage. Because of lack of protection child brides are often exposed to serious health risks, early pregnancy, and various STDs especially HIV/AIDS. There are many reasons why parents consent to child marriage such as economic necessity, male protection for their daughters, child bearing, or oppressive traditional values and norms. Globally more than one third of the women between the ages 20-24 were married before they reached the age of 18. Approximately 14 million adolescent girls between the ages 15-19 give birth each year. Girls in this age group are twice more likely to die during child birth than women in their twenties.[1]child marriage is still widespread across the nation. States like Rajasthan, Uttar Pradesh, Madhya Pradesh, Jharkhand, Chhattisgarh, Bihar and Andra Pradesh still have average age of marriage below the legal age of eighteen for females. Because of the early and often closely timed pregnancies before their bodies are able to handle the stress of pregnancy, adolescent mothers give birth prematurely or to low weight babies. The health of the child and mother are at risk and often they do not survive. Child marriage also makes girls more vulnerable to domestic violence, sexual abuse and inability to complete primary education. It is also found that infant mortality rates are higher than the national average in the states where child marriage is highly prevalent. It was defined by The Child Marriage Restraint Act in 1929, and it set the minimum age of marriage for men as 18, and women as 15. That law was questioned by Muslims, then superseded by personal law applicable only to Muslims in British India with Muslim Personal.

Law (Shariat) Application Act of 1937, which implied no minimum limit and allowed parental or guardian consent in case of Muslim marriages. Section 2 of the 1937 Act stated...any other provision of Personal Law, marriage, dissolution of marriage, including talaq , ila, zihar, lian, khula and mubaraat, maintenance, dower, guardianship gifts, trusts and trust properties, and wakfs (other than charities and charitable institutions and and charitable and religious endowments) the rule of decision in cases where the parties are Muslims shall be the Muslim Personal Law (Shariats) Application Act of 1937.

The 1929 law for non-Muslims was revised a several times after India gained its independence from the colonial particularly in 1978 rule, when the marriage age was raised by 3 years each for men and women. The applicability and permissibility of child marriage among Muslims under the 1937 Act, under India's Constitution adopted in 1950,

[1] http//en.wikipedia.org/wiki/Child_marriage_in _India

remains a controversial subject, witha series of Supreme Court cases and rulings. The definition of child marriage was last updated India with it. The Prohibition of Child which applies only:

(a) to Hindus, Christians, Jains, Buddhists and those who are non-Muslims of India, and

(b) outside the state of Jammu and Kashmir.

For Muslims of India, child marriage definition and regulations based on Sharia and Nikah has been claimed as a personal law subject. For all others, The Prohibition of Child Marriage Act of 2006 defines "child marriage" means a marriage or a marriage about to solemnized, to which either of the contracting parties is a child; and *child* for purposes of marriage is defined based on gender of the person- if a male, it is 21years of age, and if a female,18 years of age.[1]

Consequences of child marriage:

Child marriage is linked to a series of negative consequences for young girls in society World Health Organization declares, "There are multiple consequences of child marriage interms of the health and the social and economic situation of adolescent girls. Early onset of sexual activity and the pressure on young married women to prove their fertility as soon as possible after marriage results in high rates of fertility" (WHO, 1999) Majority of girls drop out by the time they reach the 9th or 10th standard Indeed, the effect of child marriage is multifarious. It is a direct violation of children's right to personal freedom and growth, and specifically their right to decide their own age of marriage. The practice of Child Marriage takes a heavy toll on the physical, intellectual, psychological, and emotional state of the children involved. Several studies have reported that adolescents in general, and irrespective of marital status are poorly informed about sexual and reproductive health matters. Some of the consequences of Child Marriage are as follows:

1. Isolation and Depression:

Once married, girls are taken to their husband's house, where they assume the role of wife domestic worker, and eventually mother. These new homes can be in a different village or town.

[1] Ibid

Because of the high dowry paid, husbands are usually much older than the girls (and thus have little in common with them) and their new brides are expected to reproduce. Polygamy may also be acceptable in some of these regions. As a result, the girls feel rejected, isolated, and depressed. Some girls realize that survival requires embracing their new environment and proving their fertility. They lose their childhood and miss the opportunity proving their fertility. They lose their childhood and miss the opportunity to play, develop friendships, and be educated.

2. **Impact on mental health:**

Another consequence of child marriage on young girls is the severe ramifications it has on their mental health. The relationship between gender inequalities and negative mental health as its consequence, particularly depression and anxiety, has been well documented by health research. Recent WHO statistics show that mental health problems account for 11.5 percent of disability adjusted life years lost compared to 10.7 percent for cardiovascular diseases,8.1 percent formaternal and paternal conditions ,6.1 percent for STDs/HIV and 5.8 percent for cancer. In India, child marriage and cultural constraints on females roles have been associated with depression.

3. Risk of Sexually Transmitted Infection and Cervical Cancer:

Parents believe that marrying their daughters early protects them from HIV/AIDS. Research has shown the opposite: Because the girls try to prove their fertility, they had high-frequency, unprotected intercourse with their husbands. Their older husbands had prior sexual partners or were polygamous. In addition, the girls virginal status and physical immaturity increase the risk of HIV transmission secondary to hymnal, vaginal, or cervical lacerations. Other sexually transmitted infections, such as herpes simplex virus type 2, gonorrhea, and chlamydia, are also more frequently transmitted and enhance the girls' vulnerability to HIV. Research demonstrates that child marriage also increases the risk of human papillomavirus transmission and cervical cancer.

4. Vulnerable to domestic violence:

A UNICEF study points out that India has one of the highest levels of domestic violence whereby 67% of women, who were married less than 18 years faced domestic violence. It has the highest levels of domestic violence cases among women compared to other countries like Zambia, South Africa, Cambodia, etc.[1] Domestic violence is a major problem among adolescent girls who marry early. Women who marry younger are more likely to be beaten, threatened or sexually abused. They are sometimes more likely to believe that a husband might be justified in beating his wife. As previously mentioned, due to the age difference between the partners, young girls are more vulnerable and therefore susceptible to abuse.

5. **Trafficking and sale of girls**:

Child marriage also results in the trafficking of children for various purposes, including prostitution, labour and exploitation. Young girls are lured/forced into marriage for the purpose of selling them to other states. RajibHaldar, Secretary, Prayas, says: "Trafficking of „married girls‟ is rampant in Rajasthan, Uttar Pradesh, Chhattisgarh and even Kerala."[2]. Also, a survey of victims of trafficking revealed that 71.8 per cent of the respondents were married when they were children (i.e., when they were less than 18 years of age). This suggests that child marriage is among the key factors that make women and children vulnerable to trafficking [3]

6. Illiteracy among girls:

Child marriage denies schooling for girls and their right to education, necessary for their personal development and their effective contribution to the future wellbeing of the society. Sometimes, girls who prefer to go to school before or after marriage may not be allowed to pursue higher studies. Usually girls are pulled out of school putting an end to the education and development. Lack of education among girls makes them vulnerable and hinders their individual development. Many parents believe that investment in a girl's education is a waste of money because ultimately she would have to get married and go away to the husband's house where she

[1] Early Marriage 2005, UNICEF
[2] Infochange, Feb. 2007.

[3] Report, Trafficking, 2002-2003, Final Report of Action Research on Trafficking in Women and Children, Volume I.

will take care of the household. Withdrawal from school in order to get her married limits her opportunities to become an informed and self reliant individual. In many cases, the Married Girl Child (MGC) is also not allowed to socialize and to make friends outside her family.

7. **Lack of decision-making power:**

Girls are not able to discuss issues related to pregnanacy, childbirth and contraceptive use when they are married at young age, thus denying their basic reproductive rights.

8. Early maternal deaths:

Girls who marry earlier in life are less likely to be informed about reproductive issues and because of this, pregnancy-related deaths are known to be the leading cause of mortality among married girls between 15 and 19 years of age. These girls are twice more likely to die in childbirth than girls between 20 and 24 years of age. Girls younger than 15 years of age are 5 times more likely to die in childbirth.

9. Infant health:

Infants born to mothers under the age of 18 are 60% more likely to die in their first year than to mothers over the age of 19. If the children survive, they are more likely to suffer from low birth weight, malnutrition, and late physical and cognitive development. The morbidity and mortality is due to the young mothers' poor nutrition, physical and emotional immaturity, lack of access social and reproductive services, and higher risk for infectious diseases.

10. Fertility outcomes:

A study conducted in India by the International Institute for Population Sciences and Macro International in 2005 and 2006 showed high fertility, low fertility control, and poor fertility outcomes data within child marriages. 90.8% of young married women reported no use of a contraceptive prior to having their first child. 23.9% reported having a child within the first year of marriage. 17.3% reported having three or more children over the course of the marriage. 23% reported a rapid repeat childbirth, and 15.2% reported an unwanted pregnancy. 15.3% reported a pregnancy termination (stillbirths, miscarriages or abortions. Fertility rates are higher in slums than in urban areas. [1]

[1] http//en.wikipedia.org/wiki/Child_marriage_in _India

11. Violence:

Young girls in a child marriage are more likely to experience domestic violence in their marriages as opposed to older women. A study conducted in India by the International centre for Research on Women showed that girls married before 18 years of age are twice as likely to be beaten, slapped, or threatened by their husbands and three times more likely to experience sexual violence. Young brides often show symptoms of sexual abuse and post-traumatic stress.[1]

Laws against Child Marriage:

It is worthwhile highlighting important legislative measures taken in the last century to reduce early marriages in India. It is not entirely correct to assume that early marriage and early pregnancy enjoyed complete social approval in the pre-independence era. The forming of a variety of social legislations at this time shows that the initiatives for policy change were undertaken. There are three main laws dealing with the issues of child marriages in India:

1. The Child Marriage (Restraint) Act, 1929,

2. The Prevention of Child Marriage Act, 2004 and

3. The Prohibition of Child Marriage Act, 2006.

According to these Acts, "child" means a person who, if a male, has not completed 21 years of age, and if a female, has not completed 18 years of age.

1. The Child Marriage(Restraint) Act, 1929: It was a law to restrict the Practice of child marriage. It was enacted on 1 April 1930, extended across the whole nation, With the exceptions of the states of Jammu and Kashmir, and applied to every Indian citizen. Its goal was to eliminate the dangers placed on young girls who could not handle the stress of married life and avoid early deaths. This Act defined a male child as 21 years or younger, a female child as18 years or younger, and a minor as a child of either sex18 years or younger.

The punishment for a male between 18 and 21 years marrying a child became imprisonment of up to 15 days, a fine of 1,000 rupees, or both. The punishment for a male above 21 years of age became imprisonment of up to three months and a possible fine. The punishment for anyone who performed or directed a child marriage ceremony became imprisonment of up to three months and a possible fine, unless he could and avoid early deaths. The

[1]http://www.icrw.org/child-marriage-facts and-figures

punishment for a parent or guardian of a child taking place in the marriage became imprisonment of up to three months or a possible fine.[1] It was amended in 1940 and 1978 to continue raising the ages of male and female children.[1]

2. **The Prohibition of Child Marriage Act, 2006**

The Government of India brought the Prohibition of Child Marriage Act (PCMA) in 2006 and it came into effect on 1 November 2007 to address and fix the shortcomings of the Child Marriage Restraint Act. The change in name was meant to reflect the prevention and prohibition of child marriage, rather than restraining it. The previous Act also made it difficult and time consuming to act against child marriages and did not focus on authorities as possible figures for preventing the marriages.

This Act kept the ages of adult males and females the same but made some significant changes to further protect the children. Boys and girls forced into child marriages as minors have the Option of voiding their marriage up to two years after reaching adulthood, and in certain circumstances marriages of minors can be null and void before they reach adulthood. All valuables, money, and gifts must be returned if the marriage is nullified, and the girl must be provided with a place of residency until she marries or becomes an adult. Children born from child marriages are considered as legitimate, and the courts are expected to give parental custody with the children's best interests in mind. Any male over 18 years of age who enters into a marriage with a minor or anyone who directs or conducts a child marriage ceremony can be punished with up to two years of imprisonment or a fine.[2]

3. Compulsory Registration of Marriages Act, 2006:

All marriages need to be registered in India under the Compulsory Registration of Marriages Act, 2006. It states that every Indian citizen needs to register his or her marriage within ten days of their marriage, irrespective of religion. Such compulsory registration would be of critical importance to prevent child marriages in the country. The state governments in Madhya Pradesh ,Uttar Pradesh, Haryana, and Bihar, where child marriages are so rampant, have not taken initiative to make registration of marriages compulsory. The Central Government has made it mandatory for all States to make registration of marriages compulsory saying that the states are in a better position to know the social structure and local conditions about their respective states.

[1]Goswami, Ruchira, 2010, "Child Marriage in India: Mapping the Trajectory of Legal Reforms" http://sanhati.com/excerpted/2207/
[2]Government of India: Ministry of Women and Child Development, "The Child Marriage Restraint Act" http://wcd.nic.in/cmr1929.htm

There are gaps in this law as it has been left to State Governments to take initiative. Secondly, non-registration of minor's marriage does not render them automatically void. [1]

Recommendations:

1. Awareness Generation Programme: All stakeholders, including parents, relatives, panchayat Members, the police, NGOs, social workers, district magistrates etc., should be sensitized and Convinced about the negative impact of child marriage on children and about protecting the Sexual and reproductive health and rights of girls and young women.

2. Gender Sensitization Programmes: Gender training programmes should be spread all across the district for the police forces, NGOs and other stakeholders alike. They should be trained about the risks and disadvantage of child marriages and also through such trainings the primary secondary education of girls should be promoted.

3. Checking Loopholes in the Law: Rectifying the loopholes in the law is a significant way to control child marriages. Loopholes in the Law must be corrected to strengthen the document against those who break the law.

4. Stringency of Punishment: Under the „Prohibition of Child Marriage Act, 2006" whoever performs a child marriage is punishable with rigorous imprisonment which may extend to two years or with fine which may extend to one lakh rupees or with both. Though a lot of people are aware about the law against child marriages but due to the lack of enforcement and political will they continue to follow the practice. Only when the law is made strict and strong actions are taken against those who continue to practice child marriages, the menace can be tackled.

5. Prevention Child Marriage Officers (CMPOs): All police officials and CMPOs in the state need to have the will for enforcing the law against child marriage. CMPOs need to be appointed or if present they need to be trained to be vigilant and take strict actions against the culprits.

6. Set-up of Special Cells: In the district level, special cells must be set up which will specially on cases of child marriages. Keeping a check on the marriages taking place in the villages may bring down the number of child marriages.

7. Registration of Marriages: The provisions of registration need to be implemented in a simple and user-friendly manner. Most of the families do not register marriages, in fact, many are not even aware about it. Registration facilities should be provided at the lowest rung of our administrative structures in the rural areas and in the urban slum dwellings.

[1]www.csrindia.org/casestudies.

8. NGOs to Report/Intervene: NGOs should be given the authority to report and intervene with the help of district magistrates, police or other social workers in the cases of child marriage.

9. Safety and security of Girls: Trafficking is a serious issue when we talk about child marriage. Both are linked to each other as many girl children are forced into marriage after being kidnapped from bordering states/areas. To curb such happenings, the laws have to be made more stringent and proper enforcement of the Prohibition of Child Marriage Act in conjunction with the Immoral Traffic Prevention Act particularly in border states/areas needs to be implemented.

10. Security to Girls and Boys: A safety net must be created for girls and young women who escape a forced and often violent marriage. In few case , it is revealed that the children were forced into marrying early and in some cases girls escape from forced marriage. Such girls and even boys should be given security by the CMPOs and police of the district so that no harm is done to these children by their own family members.

11. Role of Media: Media can play a proactive role in creating awareness regarding child Marriages. They can broadcast child marriages taking place in the villages so that action can be Taken by NGOs, district magistrates and CMPOs. They can even report such cases to the local police authorities as a preventive gesture.

12. Promoting Education of Girls: In a society largely governed by beliefs, rituals and a desire to follow the cultural ethos as prescribed, education is perhaps the only potent weapon that could combat undesirable practices embedded in the system. Legislation, laws and enforcement only assist in this endeavor. Women should also be made aware of legal literacy and a sense of self confidence and self belief should be instilled in them. Universalisation of education thus is a primary requirement if child marriage is to be eradicated.

13. Income-Generation Programmes & Policies: One of the factors for child marriage was Poverty. Though a number of poverty alleviation programmes and employment generation programmes have been put in place, more than 220 million people are still Below Poverty Line (BPL). Women and children are traditionally most affected by poverty. There is, therefore, an urgent need to seriously address the issue of poverty in India.

14. Political Will: The role of people's representatives such as Members of Parliament, Legislative Assemblies and local bodies is crucial as they interact with people regularly. They should be educated on the need for advocacy against child marriage. Politicians should be vigilant about the Human Rights Conventions like CRC, CEDAW and other related treaties and whether are being fully implemented at the state level.

Conclusion:

The problem of child marriage in India is a complex one because of religious traditions, social practices, economic factors and blind beliefs. Since there are no references available of child marriage in ancient India, it is difficult to trace the practices origins. Incidents of child marriage are restricted to few communities in northern states where child marriage more prevalent than in south. It is the advent of different forms of culture which came in from the northern borders which may have influenced various communities to resort to early marriages.

Despite the provisions of strong policies and Acts against Child Marriage, several reasons are ascribed to the continued practice of early marriage today .The prevalence of child marriage is a reality. People admit that their caste/community practices it. The reported cases of child marriage are few. The reason being that individuals are guided by collective instincts. The enforcers and interpreters at the local level are products of the same socio-cultural milieu. They may be using informal ways to stop the practice but formal means are put to use under extreme pressure. Registration of marriages is not a norm but an existing laws and the awareness campaign taken up from time to time against the practice of child marriage have failed to diminish the fervor of the communities even in the 21st century. In some of the states, particularly in Rajasthan on the occasion of "Akha Teej", which in some other parts of the country also known as " Akhaya Tritiya", a day considered as auspicious for solemnizing marriages, child marriages are solemnized in large groups openly with little or no resistance from the community leaders. Child marriage, then, in some cases survives due to the passivity, apathy and even support from members of the society.

ACTIVIZING AND EMPOWERING THE INDIAN GAY COMMUNITY: A HUMAN RIGHTS PERSPECTIVE[1]

Homosexuality or being 'gay'

[1]KaushikChowdhury, Post Graduate Department of Law, University of Calcutta, Kolkata

The idea of homosexuality as a strand of alternative sexuality has made deep inroads into the psycho-sexual landscape of the global society with varied emphasis upon its legitimacy, either moral, natural or legal depending upon the accepted notions, religious undertones, socialization processes, cultural peculiarities, legal tenor and a host of interrelated and dynamic factors which can be truly credited as the causative parameters underpinning the configurative and functional interpretation of homosexuality. Homosexuality per se, has down the ages, gathered enough layers of connotational, social and sexual experiences which cumulatively with nuanced terminological departures has with due consistency redefined its connotative ambit. Various theories and philosophies are extant in the popular human rights discourse that more or less intend to magnify several essential aspects of homosexuality and intends to give shape and some degree of permanence to its constitutive genre. However, every time when such an attempt is made, it proves to be oversimplified and imprudent and circumstances are not wanting where strident attacks are made to controvert seemingly established premises aimed towards disciplining the contents of homosexuality as a psycho-sexual identity. The prime and perhaps the most attractive and cogent reason for such repeated disputation with any alleged stereotyping of homosexual behavior is the intrinsic fluidity and transformative elements that tend to define and structure the regime of homosexuality. A prismatic view of homosexuality as an orientation can definitely illumine any piecemeal feature of this strand of sexuality but such an approach will be highly problematic when it comes to imputing any disciplinary rigor to the impugned topic. Simply understood in layman's version, homosexuality is sexual attraction between two persons essentially affiliating to the same sex. In other words, it is same-sex relationship. Various ideas are abound regarding the stance of the medical fraternity on homosexuality. But through developments down the ages and with the ever increasing scientific temper and medical discoveries, a sort of unanimity has been arrived at regarding the normalcy or naturalness of homosexuality. There has been a growing consensus among the medical professionals on a global scale regarding the fact that homosexuality is neither a psychological affliction nor a sexual aberration or deviance. But homosexuality as a sexual identity or orientation has always remained stigmatized and marginalized in several parts of the globe in general and in India, in particular, because of historical unacceptability of such a truth which has been repeatedly bracketed as an immoral, irreligious and sinful act which demeans one's personhood and falsifies

the reason of his birth. All such negatives accorded to homosexuality has been empirically found to be rooted in non-procreative nature of sexual act and the age old conviction, though erroneous, that sexual activity must necessarily be laced with procreation. As homosexuality negates reproduction, it has been considered by many to be abnormal and eccentric since it tinkers with the purported designs of God.

Gay Movement in the Indian context

Gay Movement in India or Gay India is a comparatively recent phenomenon, a post modernist movement which has its pockets of tension and rebellion sporadically visible but integrative and holistic in its appeal and approach primarily due to the internet, media and the conscious and efficacious participation of various NGOs dedicated towards enhancement of the gay visibility. Moreover, an indomitable effort made by the civil societies have no doubt created a lot of furor in the mainstream society and quite amazingly due to consistent efforts by the gay activists through well directed cooperation and coordination, a sizeable section of the heterosexual majority have started empathizing with the homosexuals and started realizing that there is no point in suppressing this community as they are all the creatures of God and their orientation is as natural as that of the heterosexuals. But such a reorientation of the majority mindset which involves both unlearning about the myths and prejudices regarding the gay community and learning about the realities of their lives and developing a scientific temper coupled with social consciousness is a time consuming proposition. However, the overall situation has changed for a good in India so much so that it has assumed an activist role and may be rightly called to be a gay movement in India. Various NGOs working on the issues of homosexuality have several drop-in centres in Delhi, Bangalore, Kolkata and Pune where the homosexual men may congregate and engage into exchanges and interactions. Thus the NGOs are doing a very noble job of providing a platform for socialization and at the same time a forum for ventilating their grievances and demands, which are increasingly earning recognition and appreciation in the international space through the instrumentality of communication technologies. Due to such collective efforts from all the four corners of India by dedicated souls representing various NGOs like SAATHII, KOSHISH, BOMBAY DOST, HUMSAFAR, PRATYAY GENDER TRUST and the like have resulted in a sort of gay activism and this is definitely a welcome gesture

towards diligent mainstreaming of the gay community in India. India has now earned a reputation of Gay India in the transnational gay community and the position of the gay community is becoming clearer in the international arena as a result of such persistent canvassing of the homosexual issues.

The Indian Gay Community: Relational Dynamics between Law and Society

Now I turn to the most significant part of my thesis, the part that identifies itself with the very purpose of this discourse- the gay community, their aspirations, their demands, their conflicts, their society as understood by them and their version of how the NGOs and the civil societies are working for the empowerment of their community. Based on my field work/survey of a representative sample in Kolkata, I have arrived at a host of inference regarding a mosaic of aspects of the gay world that impact their lives and existence. My questions were essentially open-ended so that the interviewees get a fair chance to speak their hearts out and since my sample size was small, open questions helped me to cull as much information and insights as possible from the interviewees. What I have realized and what all have come to my attention while interviewing are a very pertinent set of information that has not only augmented my knowledge base regarding the gay community in general but has also helped me to do away with a host of misconceptions and prejudices that I bore in my mind prior to this research. First of all, I will emphasize upon the classical binary which have the most striking influence upon the gay community, in the way they fashion their thoughts, ideas and articulate their issues – society and law. The duo plays the most pervasive and conspicuous role in shaping or annihilating the gay aspirations.

Society plays the most primary and dominant role in the gay arena. Having regard to the Indian society, there is no denying the fact that the society has always proved to be an instrument of oppression and discrimination against the gay community. Society can rightly be called to be an invisible collective force, a collective conscience that tends to regulate the individual decisions and behaviors of any member of the society. It has huge force and it does tend to resist any socially deviant behavior. The gay community has, down the ages, been victim of extreme social oppression and victimization. My interview of a host of gay identified men has revealed one most compelling truth that the society has never accepted homosexual relationships though

various men who claim to be heteronormative have many times engaged in homosexual activities with the homosexuals. Thus, there is no gainsaying the fact that a sense of crippling and debased hypocrisy has always been a perennial feature of our society. The most common reason for such gross unacceptability of the homosexual relationship among a host of factors sometimes has been the inherent irreligiousness in being gay. The society has always, for furthering the interests of family, gave utmost importance to the concept of perpetuation of generation and any sexual affinity which does not accommodate this feature of generational progression is condemned and looked into with highest disapprobation. This had been the most popular reason for stigmatizing and marginalizing the gay community since ages. It is not that the society does not understand at all that homosexuality is not an illness. But it is the hetero-patriarchy that tends to regulate homosexual tendencies not through reconditioning or transformative therapies (though these may also prove futile) but by sheer suppression. It is this suppression in the nature of an imposition upon the timid gay souls that becomes the first source of opprobrium. The harshest form of resistance starts with the family, the basic unit of a society. In most of the cases, it is found that gay men find it extremely difficult to come out of the closet and divulge their sexual orientation and even if someone does that, meets with a strong opposition from the family members in the form of rebuke, scorn, forced marriage and even physical violence. The prime reason for such harsh behavior meted out to the gay men is the stereotyped conception of society towards gender role, masculinity and femininity. Therefore, most of the gay men find it quite impossible to garner courage and confidence to open out to their family members. Indian families usually are found to be very conservative and traditional and these features of the majority of the Indian families are the true reason for the disappointment and frustration of the gay men. The automatic consequence of such emotional turmoil of the gay men ends in suicides, acute bouts of depression and other serious and deadly consequences. In addition to it, the larger society looks at him with curiosity, ridicule and sometimes reprobation. The cumulative psycho-social effect makes the gay man a victim of persecution and paranoia. A constant state of threat and terror hovers above him and he ultimately either succumbs to them or becomes a mentally wreck. The question why should a gay man suffer such unthinkable and intolerable misery for no fault of his? Why the society shall terrorize a gay just because he wants to be what he is? Politicians and legislators will give very weird justifications trying to keep homosexuality issues under the

blanket, still treating it to be a social taboo. They will say that there are more crying issues in India to address than homosexuality. But such an explanation or statement is verily suggestive of a biased mindset against homosexuality very much in accord with the homophobic majority. The politicians, the legislators, the judiciary conceive of homosexuality as something which is unnatural and such a conception is essentially through heterosexist lenses. A heterosexual at the most may sympathize with a homosexual but cannot empathize with him and here lies the crux of all problems. The majority community promises to find solutions for the minority community, the majority has the administrative, legislative and judicial strength to give opinions and formulate policies pertaining to the gay community. What is therefore required is proper representation of the gay men in various instruments and agencies of the State which seems to be still a far cry. Since homosexuals are sexual minorities, they should have sexual freedom or liberty to fight for equality with regard to their sexual rights and this is the first comprehensive step towards functional social democracy.

The second factor is law, which largely impacts the homosexual realities and homosexual experiences. If we consider the legal stand on homosexuality on a pan world basis, we usually come across three essential approaches of legal systems of various countries towards homosexuality:

a) The laws of some countries legalizing homosexual relationships and gay marriages
b) The laws of some countries legalizing homosexual relationships but not gay marriages and
c) The laws of some countries criminalizing homosexual relationships and therefore quite axiomatically no question of gay marriage arises.

Thus, the legal tenor or fabric of a country plays a very decisive role in shaping or marring the aspirations of the gay community in that country. Gay activism or gay movement has in most of the cases been a result of discriminatory laws or oppressive or draconian legislations which leads to usurpation of the natural rights of the gay community and thus is a potent hindrance to their sexual freedom. Specifically having regard to the recriminalization of homosexuality in the recent verdict of the Apex Court, there has been a lot of furor in the gay world. The most popular protest of such a mindless judgment by the Supreme Court of India according to the gay rights

activists is the emotional and psychological cost of so many gay persons who had out of their own volition entered into romantic relationships with other gay men after the decriminalization of homosexuality by the Delhi High Court in 2009. However within a span of 4 years the Supreme Court of India overruled the Delhi High Court verdict and recriminalized homosexuality. After such a judgment, it seems it is not only the society but even the judiciary has not left a single opportunity to ridicule the homosexual society. According to many gay men, as it came out in the interview, quite vehemently, such a verdict seemed to have played havoc with the lives of the gay men. They were, as if, puppets subject to the whimsical decisions of the courts. Therefore such a decision had a very adverse impact on the entire homosexual community. Since 2002, a petition has been traversing the corridors of the Delhi High Court in order to read down Section 377 of the Indian Penal Code. The petitioners are part of the queer rights movement in India and they locate the petition as part of the new language of queer activism. How do we understand legal challenges versus efforts at social change in larger society, that is, a protest march, a film festival, the politics of everyday queer lives, or a mass movement? There is a distinction to be made between efforts at social change within and outside the law. Section 377, IPC, effectively criminalizes same-sex sexual activity between men, even if it is consensual, between adults and in private. Studies have shown that its use has been largely limited to cases of child abuse involving young boys. The paucity of court decisions under section 377 however does not reflect the tremendous and debilitating impact it has on the lives of queer people for the story of Section 377 plays out mostly outside the courts. Instances are not wanting, ranging from documented violations to anecdotal evidence showing how violence, intimidation and fear in the lives of queer people are legitimized in the name of this law- the routine and continuous violence that queer groups, especially the hizra and the kothicommunities living outside the privileged classes, face at the hands of the police on almost a daily basis; or the parents who fear for their queer son or daughter because the law criminalizes homosexuality. There was a petition in the Delhi High Court that asked for reading down of Section 377. At the time of writing, the petition was being heard by the Supreme Court of India after being dismissed on a technicality by the High Court. Reading down is different from asking for a repeal- the petition was not asking for the law to be removed, but was only asking for its interpretation to be changed. If the petition had succeeded, the same-sex sexual activity between consenting adults in

privacy would not have been a criminal offence. The government response was as much a doctrine on prevailing social values as it was a legal response to a court petition. They argued that the purpose of Section 377 is to provide a healthy environment in society by criminalizing unnatural sexual activities. Completing their rhetoric of moral panic, the government went on to describe how changes in law could well open the flood gates of delinquent behavior and be construed as providing unbridled license for the same. What does it mean for a government to be able to respond to a legal petition in this manner? When the government uses the argument that by and large, Indian society disapproves homosexuality, to then say that this disapproval is strong enough to justify it being treated as a criminal offence; how do we understand a conception of law where social opinion carries the weight of justice? Perhaps more importantly, how do we, as activists, respond to such a conception of law and justice, and what are the implications of our response? These are real grey issues. The gay community needs to be aligned with the mainstream society and the initiative must come from the legal system of our country because where law permits an act, it gradually becomes socially accepted. There were many social maladies that existed in the brahmanical system of Hindu society like sati and casteism. But with the legal system disapproving such pernicious practices have always worked towards gradually abhorring such incoherent social practices and it is quite understandable from such instances that legal sanction means a lot to the gay world. It is legality which confers legitimacy to any act, practice or habit and once it is legitimized society cannot keep on disregarding it or disapproving it. Thus the legal system means a lot to the community and if I analyze the responses of various interviewees with regard to the want of legality of such a relationship, the maximum response that came in was a very expected desire for legal sanction of gay relationship and gay marriage. Thus one thing seems quite prominent and that is law and society is inextricably woven. What law permits, hardly the society can abhor.

Raising consciousness among the heteronormative society in the naturalness of gender and sexual fluidity and breaking the barriers of inhibited and parochial religious and cultural overtones

Consciousness is a mental condition, which does not come quickly and easily within a short span of time. The social mindset is indeed a big challenge, which poses loads of constraints in the

form of illiberal and conventional straitjacket. To come out of the box especially by individuals who have been used to a specific pattern of thought process, who are so umbilically laced with the heteronormative sexual relationship, sexual ideology and relationship equation find it increasingly difficult to accept any sexual relationship that tends to threaten or challenge their stereotyped conception about human sexuality. Therefore the idea that a man may get attracted towards another man and may feel love in all its shades and colors in the same way as a heterosexual romance, seems unbelievable and inconceivable by the conventional society. All these explanations and mindsets are very pertinent and any reactionary tendency to oust any deviant sexual behavior is germane as long as things are intended to be understood on the heterosexist anvil. The real challenge lies in not being able to visualize the rigors through which every person in the society passes because he/she belongs to the sexual minority more so in a country like India where such sexual relationship neither bears social allegiance nor the stamp of law. As a result, years of suppression, fear, intimidation, lack of support, parental hatred, social exclusion and relational taboos- all create serious depression in the deep abyss of mind. Gradually a homosexual starts withdrawing from the society in which he lives because somehow somewhere he finds himself completely out of place, a gross misfit to the society. On top of it lack of legal sanction makes situation all the more worse and pathetic in India. The interviews conducted by me helped me realize that the most generic response of the gay men has been a strong desire for the legal sanction of homosexual relationship and gay marriage. Perhaps the bigger issue, which must either precede or succeed legal sanction is social approval or acceptance. The society should not stigmatize homosexuality merely because the majority is heterosexual. Minority interest must also find voice and legitimacy in a true democracy. In fact because a community is a minority community needs more protection and privilege than the majority so that slowly but steadily the minority can do away with the age old injustice meted out to it. Time has come to go for an institutionalized approach for changing the social mindset regarding homosexuality, which will be a slow but dogged effort with a multipronged strategy.

Reconciling the judicial and medical stance on homosexuality

The recent Apex court judgment recriminalizing homosexuality is undeniably a very imprudent and insensitive verdict hardly expected of a matured and empathetic judicial system especially

when the issue involved is a serious social issue subsuming such a substantial chunk of the Indian populace whose lives are doomed to suffer. The verdict has openly condemned the very truth of being a homosexual. Moreover, the verdict is irresponsible as it does not accommodate the medical stance taken by the various psychiatric associations around the globe and India too. Homosexuality has been deleted from the list of mental disorders prepared by World Health Organization and it is medically proved that homosexual tendencies are in no way symptomatic of any disease, either mental or physical. It is a genetic predisposition, which is absolutely natural and predestined. It is not a disease but an orientation, at best, an alternate sexual preference. Therefore, efforts must be made by all the NGOs or support groups to mobilize awareness among the masses and to influence the legislature to change the colonial statute of S. 377, IPC. Moreover, popular will is to be created towards framing of anti-discriminatory law, or anti-gay law so that the judiciary is impelled to change its stance on homosexuality. In short, the medical view on homosexuality must be adequately and seamlessly reflected in the legal and legislative reality of India and that will mark the beginning of true emancipation of the LGBT community in general and the gay populace in particular.

Tolerance to be adopted as a basic creed to stop human rights violation of this sexual minority and to increasingly believe in "LIVE AND LET LIVE" philosophy:

Tolerance is the first step to acceptance and if the society increasingly tolerates the homosexual community, it will convey a strong message that the homosexuals are being tolerated by the heteronormative society. Tolerance needs to be preceded by acceptance and succeeded by legitimization. When nature creates homosexuals just as they create heterosexuals, it can be rightly called to be natural. Hence what is natural cannot be subjected to any compulsion to be otherwise or any artificial distinction. Therefore the need of the hour is gradual social acceptance of the gay community and that is possible only through awareness and a reasoned conscience. The philosophy of LIVE and LET LIVE should be recognized.

International consciousness on equality of men irrespective of sexual orientation to be given utmost importance

The Universal Declaration on Human Rights (UDHR) guarantees right to marriage, right to family as intrinsic to right to life and such right to family is advocated irrespective of sexual orientation. This is because the United Nations has been smart and prudent enough to include the LGBT community within its embrace as LGBT community does not consist of sub-humans or non-humans. It is the greatest appeal to the humanity as a whole to realize that every human is born free and is free to choose his/her own partner driven naturally by his/her sexual preference. It is homophobia, which is a crime as it is against nature to hate someone born naturally in a specific way but homosexuality cannot be a crime or a sin as it has the desire of God since every creation has its roots in God. Therefore what is required now is an international consciousness and change of mindset so that the gay community earns greater acceptability, respectability and inclusivity. Homosexuality is not contagious as it is essentially genetic and inherent. A homosexual man cannot make a straight man homosexual and the contrary is equally true. So social boycotting of homosexuals in the fear that homosexuality if continues unabated will sooner than latter engulf the whole human race and will become a dominant sexual creed which will bring generations to a permanent halt, is chimerical and illusory. So the need of the moment is permissive and accommodating culture as signs of gradual progressive social mindset.

Active efforts towards non-discriminatory treatment of the gay community with regard to profession and other social activities

Despite the fact that the gay community consists of creative men and women rich in educational backgrounds, mental faculties and a host of other qualities, most of the gay men who cannot camouflage their identity or orientation are ridiculed and are denied the conventional and mainstream jobs thinking that their sexually deviant attitude will pollute the sexual culture at workplace. Therefore the overt gays are bound to take up such professions that are pretty accommodative of them such as fashion designing, modeling, jobs of makeup artist, masseur and the like. Thus there is a substantial loss of talent, which could have been channelized into fruitful areas for contribution towards the society. Therefore, non-discriminatory treatment of the gay community is quite axiomatically called for so that regardless of sexual orientation, individuals can take up any profession that suits their tendencies. Moreover, the Constitution of India also guarantees employment opportunities irrespective of sex, race, religion and etc. The term ‘sex’ if

analyzed or interpreted expansively, it also includes sexual orientation and by that logic, the homosexuals are entitled to non-discriminatory behavior.

Towards enhanced liberation, empowerment and acceptability of the gay community coupled with framing of anti-discriminatory laws is the surest panacea

Throughout recorded history, oppressed groups have organized to claim their rights and obtain their needs. Homosexuals, who have been oppressed by physical violence and by ideological and psychological attacks at every level of social interaction, are at last becoming angry.

"To you, our gay sisters and brothers, we say that you are oppressed; we intend to show you examples of the hatred and fear with which straight society relegates us to the position and treatment of sub-humans, and to explain their basis. We will show you how we can use our righteous anger to uproot the present oppressive system with its decaying and constricting ideology, and how we, together with other oppressed groups, can start to form a new order, and a liberated lifestyle, from the alternatives which we offer."

Conclusion

A pervasive and incisive analysis of various aspects of homosexuality in the preceding lines will have little or no purpose unless a genuine concern for this class of people permeates every soul and makes them feel empathetic for them. Life is a precious gift to every person and everyone has the right to live his life according to his preferences. It is quite unfortunate that even if gay men are created by God, the society has historically disapproved their way of life and in effect, has imposed upon them the heterosexist anvil. This has been the most pathetic reason for the endless misery and emotional turmoil and abysmal depressive state of the homosexual males. Time has come for a serious rethinking and prioritizing their concerns. Efforts are required to be made from all possible directions to ensure that not a single stone is unturned to give the gay men their legitimate rights. Many countries in the globe are increasingly legalizing gay relationships and gay marriages and these developments on a global scale are setting precedents for the other countries to follow suit. What is natural cannot be suppressed or colored.

They eventually come out in one form or the other. Therefore accepting this strand of alternative sexuality is the need of the moment and a day will come when the gay community will no more need to hide their love and their entity. They will no more require caging their emotions and feelings for their partners. They will no more require crying secretly behind closed doors or meeting their lovers furtively in secluded corners of blind alleys. Such a moment will be a moment of truth and the root to true emancipation.

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CASE COMMENTARY ON NIRBHAYA'S CASE WITH DISCUSSION ON JUVENILE JUSTICE ACT, 2015[1]

Abstract

[1] Aswinikumar Bairagi, 2nd year BA., LL.B. (Hons.), School of Law, Galgotias University.

One of the heinous crimes of the decade committed by a juvenile, which compelled the lawmakers to think about the amendment in the Juvenile Justice Act. The Lawmakers amended the act but we can able to find some loopholes in the amendment. The main aim of the research paper is to discuss about the contradictions in the new amendment.

Keywords:- Juvenile Justice Act, Loopholes in the amendment

INTRODUCTION

1. Name of the Case: State Through Reference v. Ram Singh &Ors.[1]

2. Citation:- CRL. APP. No. 1398/2013

3. Date of Judgment: 13.03.2014

4. Names of the Judges Constituting the Bench: RevaKhetrapal and Pratibha Rani, JJ

5. Name of the Judge Delivering the Judgment: RevaKhetrapal

6. Brief facts of the case in a narrating form:

On 16.12.2012 accused Ram Singh, Mukesh, Akshay @ Thakur, Pawan @ Kalu, Vinay and the JCL had dinner at the jhuggi of accused Ram Singh. Thereafter, the accused persons conspired to take bus bearing No. DL-1CP0149, which was being habitually driven by Ram Singh as an employee of Yadav Travels and which was in his custody on the date of the incident, and pick up passengers who they would rob and also pick up a woman passenger to satiate their sexual appetite. Pursuant to the conspiracy, the accused persons picked up Ram Adhar on 16.12.2012 at about 8:30 PM, robbed him of all his valuables and beat him before throwing him out of the bus. The complainant and the prosecutrix had seen a movie at PVR Select City Mall, Saket and then taken an auto-rickshaw till Munirka Bus Stand. At Munirka Bus Stand, they boarded the bus in which the crime took place. The accused persons took Rs. 10/- each as fare from both the victims. A few minutes after boarding the bus, they switched off the lights of the bus and three of

[1]Available in http://lobis.nic.in/ddir/dhc/RK/judgement/12-03-2014/RK13032014DSRF62013.pdf

the accused persons, namely, Ram Singh, Akshay Kumar and JCL started misbehaving with the complainant asking him why he was with the girl: "Tuitniraatkoladkilekarkahanghoomrahahai". Thereupon, an altercation took place and the three of the accused persons then started to slap and beat up the complainant, who retaliated. Thereafter, the two other accused, namely, Vinay and Pawan joined in hitting him with two iron rods and tore off all his clothes. The accused then took away all the belongings of both the victims viz. mobile phones, purse, credit card, debit card, etc. Accused Ram Singh, Akshay @Thakur and the JCL then took the girl to the rear of the bus, beat her up and raped her one by one. During this time, accused Pawan @ Kalu and Vinay were holding the complainant and had pinned him down, and Mukesh was driving the bus. Thereafter, accused Ram Singh, Akshay and the JCL held the complainant while Pawan @ Kalu and Vinay raped the prosecutrix. Finally, accused Akshay @ Thakur took over the bus for a while and during this time accused Mukesh who was driving the bus came and raped the girl. Throughout this period, they continued to assault the complainant with iron rods. So far as the prosecutrix is concerned, the accused persons not only raped her but also bit her all over her body and hit her repeatedly. The accused persons then inserted rods and hands in her rectal and vaginal region. The accused persons with an intention to kill the prosecutrix and to ensure that their identities remain concealed forever, repeatedly inserted the iron rods and their hands into her vagina as well as rectum pulling out the internal organs. The nature of injuries, to say the least, was horrific, and without doubt would have caused her death in the ordinary course of nature. The intention to kill the victims is further clear from the fact that the crime committed, the accused persons attempted to throw the victims from the back door of the bus but finding it to be jammed, threw the victims from the front door of the moving bus, and thereafter tried to run them over. The prosecutrix was saved from the wheels of the bus on account of the fact that the complainant was able to pull her away in time. The accused persons in order to ensure that they are not caught and to further ensure that they leave no trace of the brutal incident, systematically attempted to destroy all the evidence of the incident. They first cleaned the bus with the clothes of both the victims and then washed the bus with water and thereafter burnt the clothes of the victims. After destroying the evidence in the aforesaid manner, the accused persons divided the loot amongst themselves in the following manner:

a) Accused Mukesh kept one 'Samsung' mobile with him.
b) Accused Pawan @ Kalu kept one wrist watch&Rs. 1000/-.
c) Accused Vinay kept a 'Nokia' mobile phone of the prosecutrix& a pair of 'Hush Puppy' shoes taken from the complainant.
d) Accused Akshay kept two rings, i.e. one silver& one gold taken from the complainant alongwith two metro cards.
e) The JCL kept a Nokia mobile phone, Rs. 1,100/-& one ATM card.
f) Accused Ram Singh (since deceased) kept one debit card with himself.
g) The intention of the accused persons was not only to commit gang rape on the prosecutrix, but to also rob the complainant and the prosecutrix and then to kill them and destroy all incriminating evidence so that they could not be tracked down.

7. Statutes involved:

Indian Evidence Act,1872

Criminal Procedure Code,1973

Indian Penal Code,1860

Juvenile Justice Act(Care and Protection), 2015

8. Issues in numbered paragraphs/Bullets:

Whether life imprisonment or death sentence which one will be awarded?

9. Arguments advanced by the parties in numbered paragraphs:

The case of the prosecution is that in addition to the identification of the accused by traditional methods viz., dock identification and identification by TIP, the investigating agency adopted scientific methods for conclusively proving the identity of the accused persons, such as DNA analysis, fingerprint and bite mark analysis. In all the instances, the reports gave indication of the persons committed that act.

Photographic method: The bite mark is fully photographed with two scales at right angle to one another in the horizontal plane. Photographs of the teeth are taken by using special mirrors which allow the inclusion of all the teeth in the upper or lower jaws in one photograph. The photographs of the teeth are matched with photographs or tracings of the teeth. Tracings can be made from positive casts of a bite impression, inking the cutting edges of the front teeth. These are transferred to transparent sheets, and superimposed over the photographs, or a negative photograph of the teeth is superimposed over the positive photograph of the bite. Exclusion is easier than positive matching.

At the threshold, a plea was raised by Mr. A.P. Singh on behalf of the convict Vinay Sharma that Vinay Sharma was a juvenile on the date of the incident. The certified copies of theadmission register of the first attended school and the admission form of the first class of M.C. Primary Co-Ed. School, Sector-3, R.K. Puram, New Delhi, in addition to the statements of the parents of the accused wherein they had confirmed the age of their wards. Mr. A.P. Singh next contended that the evidence of the prosecution is replete with innumerable glaring contradictions, inconsistencies, discrepancies, deficiencies, drawbacks and infirmities, which are not minor discrepancies on the fringe.

10. Brief description of other cases referred to in the judgment:

A. *ShashiNayar vs. Union of India*, (1992) 1 SCC 96 observed that the "special reasons clause" means reasons, specific to the facts of a particular case, which can be catalogued as justifying a severe punishment and unless such reasons are not recorded death sentence must not be awarded.

B. *Deepak Rai vs. State of Bihar*, (2013) 1 SCC 421, a three-Judge Bench of the Supreme Court, while noting the phonological shift in the present Code legislated in 1973 making imprisonment for life a rule and death sentence an exception, dwelt upon the words "special reasons" for award of sentence of death mandated by the provisions of Section 354(3) of the Code.

C. *Sunder vs. State*, (2013) 3 SCC 215, the Supreme Court while dismissing the appeal by the convict and affirming the award of death sentence.

D. *Gurvail Singh alias Gala and Anr. vs. State of Punjab* (2013) 2 SCC 713 To award death sentence, the aggravating circumstances (crime test) have to be fully satisfied and there should be no mitigating circumstance (criminal test) favoring the accused. Even if both the tests are satisfied as against the accused, even then the court has to finally apply the rarest of rare cases test (R-R Test), which depends on the perception of the society and not "Judge-centric", that is, whether the society will approve the awarding of death sentence to certain types of crime or not.

E. *Bachan Singh vs. State of Punjab* (1980) 2 SCC 684. By a majority of 4:1, the Constitution Bench declared that Section 302 Indian Penal Code was constitutionally valid. It is well settled that awarding of life sentence is a rule and death is an exception.

11. Critical Comments

a) Impact of the Judgment: After the Judgement, The Juvenile Justice Act was amended totally. According to New Amendment, a juvenile will be treated as a major if he committed a heinous crime. But the misuse can still take place. The law reduced the age of juvenile till 15years and he will be treated as a major if he commits a crime after 15 years. But according to the Juvenile Justice Act, 2015 and Section 83 of Indian Penal Code, A child will be treated as a minor below 18 years. But the main point is that law reduced the age of 15 but it must need to reduce it to 12 years so that if a minor commit any heinous crime, he can not be treated softly. Except this it also put a question that what will be age to become a major 16 or 18.

b. It also created one more contradiction, that is irrespective of gender, if any person under 18 years of age is kidnapped from lawful guardian, the act will be punishable whereas for IPC, the act is not punishable if done against a male of more than 16 years of age. Is kidnapping or abduction by a minor is not a heinous crime?

c. Irrespective of gender, if any person under 18 years of age is kidnapped from lawful guardian, the act will be punishable whereas for IPC, the act is not punishable if done against a male of more than 16 years of age[1]. It is a question whether this provision is against Article 14 of The

[1]Read more at: http://www.livelaw.in/kidnapping-child-bailable-offence-ipc-becomes-non-bailable-jj-act-discussion-rakesh-kumar-singh

Constitution of India ,Article 14 deals with "Right to equality". In this provision Article 14 is somehow violated. It must required to amend.

CORPORATION'S RESPONSIBILTY TO RESPECT HUMAN RIGHTS: THE CONCEPT AND THE LACUNAS WITH REGARD TO INDIAN LAW[1]

Introduction:

[1] Dimple Garg, 3rd Year Student , National Law University Institute, Bhopal.

The term HUMAN RIGHTS is formed from 2 words – human and rights. The literal meaning of the word human is relating to or characteristic of humankind or a human being[1] and the literal meaning of the word right is a moral or legal entitlement to have or do something[2]. Joining the two, we can say that human rights are those moral or legal entitlements that someone get because he is a human being. These are those inalienable rights that a human gets by virtue of being a human. UDHR (Universal Declaration of Human Rights) is the document that form the sole basis of human rights which was further divided into ICCPR (International Covenant on Civil and Political Rights) and ICESCR (International Covenant on Economic Social and Cultural Rights).

The topic of my research paper is Corporation's responsibility to respect human rights: The concept and the lacuna with respect to Indian Law. In my research paper, first of all I will discuss about how right to do business is a human right or basically first of all I will be connecting human rights with the corporation' s major objective that is to do business and earn profit.

Initially, the duty or responsibility to protect human right and prevent human rights violation was of the state only and not of the individuals but due to the advent of globalization the trend has changed. Now, an additional responsibility has been put on the companies to protect human rights. This responsibility was for the first time provided in PROTECT, RESPECT AND REMEDY: A FRAMEWORK FOR BUSINESS AND HUMAN RIGHTS. In this framework, an additional duty is put on the business enterprises to respect the human rights of others. This means that the corporate firms have to take extra measures to respect the human rights.

The same responsibility has also been provided in Indian Law in the Companies Act 2013 under the name corporate social responsibility under sec.135. It had made mandatory for certain category of companies to spend a certain amount of money for the protection of human rights or in pursuance of human rights.

Following are the research questions I will be dealing in my project:

1. Right to do business as a human right.

[1] https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=human
[2] https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=rights

2. Obligation of the corporations to respect human rights of individuals under the framework.
3. Obligation on the corporations to respect human rights in Indian context.
4. What are the lacunas in the application of provisions regarding corporate social responsibility under Sec. 135 of the Companies Act 2013?

Right to do business as a Human Right:

The word business means a person's regular occupation, profession, or trade or a commercial activity[1] and the concept of right to work means that people have a human right to work, or engage in productive employment, and may not be prevented from doing so[2]. Engage in productive employment very well covers the activity of doing business as well. This means that right to do business is a part of right to work and hence also a human right.

The right to work is provided under both the UDHR (Universal Declaration of Human Rights) as well as ICESCR (International Covenant on Economic Social and Cultural Rights). Art. 23.1[3] of UDHR and art. 6.1[4] of ICESCR provides for the right to work.

Art. 23.1 of UDHR states that everyone which means that every human being in this world has following 4 types of rights that are related to right to work only:

1. Right to work
2. Right to free choice of employment
3. Right to just and favourable conditions of work
4. Right or protection against unemployment

Art. 6.1 of ICESCR states that

[1]https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=business+definition
[2] https://en.wikipedia.org/wiki/Right_to_work
[3] Article 23.1 Everyone has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.
[4] Article 6.1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

- every state that is party to the present covenant shall recognize right to work which include:
- Right to everyone to the opportunity to gain his living by work which he freely chooses or accepts
- And it further provides that the state party should also take steps to safeguard the right

Both the UDHR and ICESCR provides for the right to work as a human right in respective articles. As already stated right to do business is also a part of right to work, hence, right to do business is also a human right. This means that individuals have a human right to do business and then to form artificial persons (which means an entity established by law and given at least some legal rights and duties of a human being.[1]) known as corporations or companies fulfilling the requirements of law. The major purpose or the main object of these corporations or companies is to do business and earn profit.

This further means that these corporations or companies are the artificial persons that are formed by humans in furtherance of their human right to do business or human right to do work so that they can earn larger profits.

Obligation of corporations to respect Human Rights of the individuals under the framework:

In this part we will talk about the obligation of corporations to respect human rights. If we talk about the history of the initiatives, it began from ILO, WHO, UNICEF etc. But they do not talk directly about the obligation of the corporation to protect human rights, it only provides for the guidance of the incorporation of the human rights in the business circle. It were these initiatives from where the concept of corporate social responsibility began. It was this point from where the corporations have to compromise with their main objective that is to earn maximum profits. With the advent of these conventions, the corporations have to respect the human rights of various individuals. Taking the example of ILO (International LabourOrganisation), it provided the

[1] https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=artificial+person

guidance to the corporations not to exploit the labour and to ensure minimum wages to them lead to decreased profits of the corporation.

The first major initiative taken by the UN (United Nations) was the United Nations Global Compact or the Global Compact[1] which was followed by various other initiatives.

The secretary general of UN, Kofi Annan, declared in 1998 that he 'was building a more solid relationship with business community. Thriving markets and human security go hand in hand: without one we will not have the other.'[2]

Then later on 31 January 1999, the launched the Global Compact which puts an obligation on the state parties to human rights of the individuals. The compact includes 10 principles[3] that talk about the human rights of individuals.

All the initiatives till now were those whose part deals with the corporate responsibility to respect human rights. There was no explicit framework that deals only with the corporate responsibility to respect human rights. The very first initiative that explicitly deals with the corporate responsibility was United Nations Guiding Principles on Business and Human Rights (UNGPs). These are the standards that talk about the adverse effects of business activities on human rights. On June 16, 2011, the United Nations Human Rights Council unanimously endorsed the Guiding Principles for Business and Human Rights, making the framework the first

[1] https://www.unglobalcompact.org/
[2] Department of Public Information on United Nations, DPI/1820/Rev.1 June 1998.
[3]Human rights
Principle 1: Businesses should support and respect the protection of internationally proclaimed human rights;
Principle 2: make sure that they are not complicit in human rights abuses.
Labour
Principle 3: Businesses should uphold the freedom of association and the effective recognition of the right to collective bargaining;
Principle 4: the elimination of all forms of forced and compulsory labour;
Principle 5: the effective abolition of child labour;
Principle 6: the elimination of discrimination in respect of employment and occupation.
Environment
Principle 7: Businesses should support a precautionary approach to environmental challenges;
Principle 8: undertake initiatives to promote greater environmental responsibility; and
Principle 9: encourage the development and diffusion of environmentally friendly technologies.
Anti-Corruption
Principle 10: Businesses should work against corruption in all its forms, including extortion and bribery.

corporate human rights responsibility initiative to be endorsed by the United Nations[1]. The UNGP are informally known as the "Ruggie Principles" or the "Ruggie Framework" due to their authorship by John Ruggie, who conceived them and led the process for their consultation and implementation.[2]

'The framework rests on three pillars:

1. The state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication;
2. The corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and
3. Greater access by victims to effective remedy, both judicial and non-judicial.'[3]

These are the 3 pillars of the framework. They are not only imposed on the state but also on the business or the corporate. I will discuss these pillars only with reference to the business and not the state as my research paper deals the responsibility of the business to protect human rights only.

DUTY TO PROTECT:

The framework clearly states that it is the duty of the state to protect against human rights abuses by third persons. But, there is an extension provided to it which clearly states that the word 'state' for the purpose of this point or pillar also includes business which means that it is also the duty of business organisations or corporate to protect individuals from human rights abuses by third parties. It further provides that the state or the business can do so by making appropriate policies, regulations and adjudications.

RESPONSIBILTY TO RESPECT:

[1] Surya Deva, "Guiding Principles on Business and Human Rights: Implications for Companies",
[2]https://en.wikipedia.org/wiki/United_Nations_Guiding_Principles_on_Business_and_Human_Rights#cite_note-Deva-1
[3] https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf

The 2nd pillar of the framework provides for the responsibility to respect the human rights of individuals. This responsibility is also extended to both the state and the business. The term used is "responsibility" rather than "duty" which is meant to indicate that respecting rights is not currently an obligation that international human rights law generally imposes directly on companies, although elements of it may be reflected in domestic laws.[1]

Business organisations or corporate can affect the human rights of individuals in no. of ways. Leaving individuals, it can affect the human rights of its employees as well in a very easy manner. Example of it can be child labour, unequal wages to men and women, exposing employees to hazardous jobs and not providing them the required safety equipments etc. So, this pillar basically puts the responsibility on the business to act with due diligence, not involving in activities that lead to infringement of human rights and also to address the harms that had occurred to others.

ACCESS TO EFFECTIVE REMEDIES:

It talks about providing greater access to people whose human rights have been violated by providing them the effective remedies, both judicial and non judicial. Judicial remedies can only be provided by the state but non judicial remedies can also be provided by the business in the form of an internal mechanism where the violations can be discussed and a decision can be given and hence remedy can be given to the concerned victim. But only the presence of mechanism is not enough, there must be a fair panel or decision making body that can give a fair decision and that is accessible to all as well.

This is all about the framework and its three pillars that is the first corporate human rights initiative that has been endorsed by the UN.

Corporation's responsibility to respect Human Rights in Indian Context:

[1] https://business-humanrights.org/sites/default/files/reports-and-materials/Ruggie-protect-respect-remedy-framework.pdf

In this part, we will discuss about corporation's responsibility to human rights in Indian context. What are the various provisions or are there any provisions in Indian law that deals with corporation's responsibility to respect human rights?

The first formal attempt by the Government of India to put the CSR issue on the table was in the issuance of Corporate Social Responsibility Voluntary Guidelines in 2009 by the Ministry of Corporate Affairs (MCA, 2009). Prior to this, the importance of CSR was discussed in the context of corporate governance reforms, such as in the Report of the Task Force on Corporate Excellence by the Ministry of Corporate Affairs (MCA, 2000). [1] All these were the guidelines only and not the mandatory provisions that must be followed by the corporations. These only say that firms should do it and not made mandatory for them to do it.

For the very first time, in India the CSR activities were made mandatory by the Companies Act, 2013. Sec. 135 of the Companies Act makes it mandatory for certain category of corporate to invest a certain amount of money in pursuance of corporate social responsibility or for the welfare of the people, hence respecting or protecting their human rights.

Sec. 135(1)[2] states or lists the class or category of corporations that must spend a certain amount of money on corporate social responsibility. It basically enlists 3 classes of corporations, which must have a CSR committee of the board consisting of 3 or more directors, out of which one shall be an independent director and the 3 classes of corporations are as follows:

1. having net worth of rupees five hundred crore or more, or
2. turnover of rupees one thousand crore or more or
3. a net profit of rupees five crore or more during any financial year

These are the 3 classes of corporations that must form a CSR committee.

[1] http://journals.sagepub.com/doi/pdf/10.1177/0974929215593876

[2] Sec.135(1) of Companies Act 2013 - Every company having net worth of rupees five hundred crore or more, or turnover of rupees one thousand crore or more or a net profit of rupees five crore or more during any financial year shall constitute a Corporate Social Responsibility Committee of the Board consisting of three or more directors, out of which at least one director shall be an independent director.

Sec. 135 further in its sub section 5[1] states that all the types of companies that are mentioned under sub section 1 of sec 135 have to compulsorily spend certain minimum amount for the activities of corporate social responsibility. The clause also states the amount or basically what percentage is to be spent by the companies on the activities related to corporate social responsibility. It states that the company must spend at least two per cent of the average net profits of the company that it had made during the last three preceding financial years, in pursuance of its Corporate Social Responsibility Policy and they have to spend this amount in every financial year. The clause further has 2 proviso's that are as follows:

1. The first proviso to the sub section talks about the preference of area or regarding the areas to which the company must give preference for spending the CSR amount. It states that the company must give preference to the local areas or the areas surrounding, which it operates for spending the CSR amount. This proviso only provides for giving of preference, it does not make the same mandatory for the companies. It is the complete discretion of the companies where they want to spend the CSR amount.
2. The second proviso provides for the non compliance of the clause. It provides that if the company is unable to spend or it did not spend the required amount mentioned under the sub section, then the board that is mentioned under sub section 1 must mention in its report the reasons that why they were unable to spend the required amount in CSR activities. The aforesaid report is the report that is formulated under clause (o) of sub section (3) of section 134[2] of the Companies act 2013.

[1] Sec. 135(5) - The Board of every company referred to in sub-section (1), shall ensure that the company spends, in every financial year, at least two per cent. of the average net profits of the company made during the three immediately preceding financial years, in pursuance of its Corporate Social Responsibility Policy: Provided that the company shall give preference to the local area and areas around it where it operates, for spending the amount earmarked for Corporate Social Responsibility activities:
Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

[2] Sec. 134[3(o)] - the details about the policy developed and implemented by the company on corporate social responsibility initiatives taken during the year;

Now, I will enlist the top 10 Companies that have spend a part of their income the CSR activities, then, further I will discuss about some of the activities or in what ways these companies have spent this amount on the CSR activities.

'The top 10 companies that have spent on CSR activities in 2016 according to survey conducted by IIM Udaipur, Futurescape and Economic Times in partnership are as follows:

1. Tata Steel Ltd.
2. Tata Power Company Ltd.
3. Ultra Tech. Cement Ltd.
4. Mahindra &Mahindra Ltd.
5. Tata Motors Ltd.
6. Tata Chemicals Ltd.
7. ITC Ltd.
8. Shree Cements Ltd.
9. Bharat Petroleum Corporation Ltd.
10. Larsen and Turbo Ltd.'[1]

These are the top 10 companies. Now, I will discuss about the various activities done by few of them in pursuance of the CSR. But, before that I would like state that schedule 7[2] of the Companies Act, 2013 lists the various activities that may be listed by the companies in their CSR activities. The word 'may' itself suggests that the list is not exhaustive which means that the schedule only provides for a list, it does make it mandatory for the companies to select one of the activities mentioned therein. It is the complete discretion of the companies to select the areas or the activities in which it wants to spend the amount in the name of CSR.

Tata group:

'The Tata Group mostly carries out community improvement and poverty alleviation programs. Through self-help groups, it is engaged in women empowerment activities, income generation,

[1] https://www.futurescape.in/india-top-companies-for-sustainability-and-csr-2016/
[2]Schedule 7 of the Companies Act, 2013.

rural community development, and other social welfare programs. In the field of education, the Tata Group provides scholarships and endowments for numerous institutions. The group also engages in healthcare projects such as immunization and creation of awareness of AIDS.'[1]

Ultra Tech. Cement Ltd.:

Ultra Tech Cement, is involved in social work across 407 villages in the country aiming to create sustainability and self-reliance. Its CSR activities focus on healthcare and family welfare programs, education, infrastructure, environment, social welfare, and sustainable livelihood. The company has organized medical camps, immunization programs, sanitization programs, school enrolment, plantation drives, water conservation programs, industrial training, and organic farming programs.[2]

Mahindra &Mahindra Ltd.:

'Mahindra & Mahindra (M&M) established the K. C. Mahindra Education Trust in 1954, followed by Mahindra Foundation in 1969 with the purpose of promoting education. The company primarily focuses on education programs to assist economically and socially disadvantaged communities. CSR programs invest in scholarships and grants, livelihood training, healthcare for remote areas, water conservation, and disaster relief programs. M&M runs programs such as Nanhi Kali focusing on girl education, Mahindra Pride Schools for industrial training, and Lifeline Express for healthcare services in remote areas.'[3]

ITC Group

'ITC Group, a conglomerate with business interests across hotels, FMCG, agriculture, IT, and packaging sectors has been focusing on creating sustainable livelihood and environment protection programs. The company has been able to generate sustainable livelihood opportunities for six million people through its CSR activities. Their e-Choupal program, which aims to connect rural farmers through the internet for procuring agriculture products, covers 40,000 villages and over four million farmers. Its social and farm forestry program assists farmers in

[1] http://www.india-briefing.com/news/corporate-social-responsibility-india-5511.html/
[2] ibid
[3] ibid

converting wasteland to pulpwood plantations. Social empowerment programs through micro-enterprises or loans have created sustainable livelihoods for over 40,000 rural women.'[1]

These are the various activities done by few of the companies mentioned above in pursuance of the CSR activities in India.

Lacunae in the Application of CSR Provisions in India:

As already discussed, the current CSR provisions in Indian Law can be found in sec. 135 of The Companies Act, 2013. The sec. requires certain classes of companies to spend two percent average profits of last three preceding financial years. The sec. makes mandatory for the companies to spend the amount, however it does not provide for the areas in which it can spend. Although, schedule 7 of the act provides for a list of areas in which the company can spend the amount, however the list is not exhaustive, the company can spend on the areas not provided in the list.

In this section, I will discuss about the various lacunas that are there in the CSR provisions in Indian Law.

1. The very lacuna is regarding the place of incorporation of the company. Sec. 135 or basically the CSR provisions in Indian Law are applicable only to the companies that are incorporated in India and not on the branch offices of the foreign companies in India[2], which means that although the branch office of a foreign company falls with the class of companies mentioned under sec. 135(1) of the Companies Act, 2013, it is not mandatory for them to spend on CSR activities. It means that just because the company is a foreign company and not incorporated in India, it is exempted from spending on CSR activities. Agilent, Agro tech, American express[3] etc. are some of the American Companies having branch office in India but it is not mandatory for them to spend on CSR activities as they are the foreign companies or are the companies that are not incorporated in India.

[1] ibid
[2] http://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/understanding-corporate-social-responsibility
[3] http://business.mapsofindia.com/india-company/america.html

2. The second lacuna is regarding the accountability of the financial statements produced by various parties involved in the CSR spending activities. Two parties are involved in the CSR spending activities, one is the company who pays and other is receiver which may be trust, society etc.

   Accountability of the company:

   There are no provisions for the accountability of CSR spending of the company. It is found that CSR spending disclosed by the companies need not be vetted [make a careful and critical examination of (something).[1]] by statutory auditors unlike other spending.[2] This means that the CSR spending that is shown by the company in its report is not carefully examined by statutory auditors or in other words no statutory provision provides for the examination or auditing of CSR spending shown by the company in its report.

   Accountability of the receiver:

   Now, let's talk about the accountability of the trusts or the societies that receive these CSR amounts. This lacuna is further explained with the help of 2 receivers one is the charitable trust and other is the public trust.

   The financials of charitable trust do not come under scrutiny.[3] Financials basically includes the financial statements of an organization, in our case, the organization is the charitable trusts. This means that the financial statements of these trusts do not come under any scrutiny, hence it is very easy to make false financial reports regarding receipt of CSR amount from the company.

   'Charitable trusts have to give a report to the company at the end of every year which incorporates its CSR activities in the form called AOC – 4. 'Though the financials are part of the Directors' report which is audited by external auditors, the AOC – 4 itself is not subject to external audit.' It is a lacuna, says Bhaskar Chatterjee, Director General

[1] https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=vetted
[2] http://economictimes.indiatimes.com/news/economy/finance/how-indian-companies-are-misusing-public-trusts-to-launder-their-csr-spending/articleshow/49474584.cms
[3] http://economictimes.indiatimes.com/news/economy/finance/how-indian-companies-are-misusing-public-trusts-to-launder-their-csr-spending/articleshow/49474584.cms

and CEO, Indian Institute of Corporate Affairs (IICA).'[1] This further leads to the weakening of accountability of the amounts received by the charitable trusts.

Now, regarding the public trusts, these companies prefer public trusts for the purpose of spending money on CSR activities. It is done because of 2 reasons. One reason is that they are not governed properly it is easier to do the illegal acts much more easily than in any other private trust. Secondly, that there is no central repository in these public trusts where the information can be stored or in other words it is not mandatory for the public trusts to store all the information in a central system which all the way makes much easier for them to do the acts of money laundering for the companies.

This point or lacuna can further be connected with the concept of money laundering (the concealment of the origins of illegally obtained money, typically by means of transfers involving foreign banks or legitimate businesses.[2]). this connection can ne explained with the help of an example. For example, if a company donates a sum of Rs. 20 crore in the name of CSR to a charitable trust. A cheque would be issued to these trusts and payment would be made through banking channels. In return, these trusts would get a certain amount of commission and will return the remaining amount of the CSR spending to the company in the form of cash. It leads to the conversion of black money of the company into white money. It further leads to the involvement of the company into the activities of money laundering which is criminal offence and punishable under money laundering act.

3. The third lacuna is regarding the taxability of the expenditure incurred by the companies on the CSR activities. The rules that govern the CSR activities state that no tax deduction would be available for the CSR activities conducted by the companies.[3] However, if the company discharges its CSR obligations by contributing to a trust, society or PM relief fund, which has general tax exemption, the company may avail the benefit of the same.[4] This means that it would be beneficial for the companies to spend on CSR activities by contributing to the trust, society or PM Relief fund so that be exempted from tax. This

[1] ibid
[2] https://www.google.co.in/webhp?sourceid=chrome-instant&ion=1&ie=UTF-8&rct=j#q=money+laundering
[3] http://www.lakshmisri.com/News-and-Publications/Publications/Articles/Corporate/understanding-corporate-social-responsibility.
[4] ibid

further means that these trusts or societies would be receiving huge donations in the name of CSR contributions, due to which the benefit of these activities would be restricted only to a certain group of people who may not even need them and not to them who are actually on need of these benefits. Moreover, these large trusts or societies have a large group of people who are working for them there is an opportunity for these people to get unwanted or illegal benefits. In other words, there are chances that the actual amount received would be far more than the amount that is spent on the people by these trusts or societies.

4. As already discussed that in case the companies are unable to spent on CSR activities, the board have to mention or explain the reasons for the same under second proviso of sec. 135(5)[1] in the report that is to be made under sec. 134[3(o)]. There are no as such statutory or penal provisions for the same. It means that if a company do not spend the amount, it just have to explain the same in its report, there are no penal provisions for the same. Basically, the clause is based on the principle of 'expense or explain', the company has to either do the expenses or just have to explain in its report. This basically discourages the companies to not spend the amount and just explain the reason for the same in its report as they know there is no danger on them in doing so.
5. Next lacuna in the law is that these companies create false online trusts and show that they are spending the CSR amount through these online trusts. In reality, these trusts do not even exist and the whole amount reserved for CSR comes back to the company in the form of white money. It is basically a technique used by the company for the fabrication of CSR amount in the name of online trusts.

This is all about the lacunas that are there in the CSR provisions in India.

Conclusion:

[1]Provided further that if the company fails to spend such amount, the Board shall, in its report made under clause (o) of sub-section (3) of section 134, specify the reasons for not spending the amount.

In conclusion, I would like to say that human rights are the rights of an individual that cannot be taken away by anyone. Earlier, it used to be the duty of the government to protect or provide for these human rights. But due to the advent of globalization, the position has changed a bit. Today, along with the government, the burden of protecting or providing for these human rights has to be shared by certain class of companies that are mentioned in the Companies Act 2013 in the Indian context.

Now, the company is an artificial person or a group of individuals who are doing business that is one of their human rights that is to do business. Basically, individuals who in the exercise of their human right to do business earn a profit that they have to share with the people or have to spend on people who are in need of it in the form of CSR activities. Basically, the people or the company in the exercise of its human rights have to protect the human rights of others along with the government.

India is the first and the only country who have included this in its statutory laws that in the Companies Act 2013 where the companies have to spend certain amount for the well being of the society. There are certain lacunas in the implementation of the concept if it is seen in the Indian context but the concept is just 4 years old, these lacunas can be corrected in the future. It's just a beginning for it and every new thing evolves with time and according to the society. In other words, this concept in India is evolving and soon it will become the best one.

HUMAN RIGHTS OF SEX WORKERS[1]

[1]Upasana Singh, Student, Banasthali University, Rajasthan

Abstract

Sex workers, popularly known as prostitutes, are seen as a destitute stratum of society. The living conditions of these people are very pathetic. They are even deprived of basic rights, which a human should posses by the virtue of getting birth as a human being. In most of the countries it is considered as an immoral work. However, with the age of modernization, many nations have changed their viewpoint towards prostitution and sex worker. Even after getting legalized at most places, the conditions of sex workers somehow remain the same. Sex workers and their work needs to be understood and discussed on both economical and ideological basis. This article attempts to examine and present the actual condition of sex workers, what makes them more vulnerable, the problems faced by them, existing laws and what should be done to uplift their condition so that everyone comes under the shadow of the umbrella of humanity and human rights.

Introduction

A sex worker is someone who earns money by providing sexual services. Some use this term to mean only prostitution, although the term is more commonly used to refer to a variety of sex industry workers (such as adult film actors, nude models, exotic dancers, peep show performers, masseuse in parlours, phone sex workers, and hostesses in clip joints). In this paper, we will limit our discussion only to prostitution.

Prostitution is the ultimate degradation of women. It the most common name given to the business or practice or work of sex workers. This word pictures shame, exploitation, misery, torture and ill- health. The institution of prostitution has existed in one form or another in all times. Several sayings are there about it, one of which is that it is one of the oldest professions in the world! In Indian history we find enough mention of it. In one or another form it has always sustained in society of all times.

Ancient Sanskrit literature indicates existence of prostitutes. In the Rigveda, Vra, a she elephant denoted the same as ganika[1]. In Mahabharata and Ramayana both the word ganika and vesya were used for the designation of prostitutes. Ganika, according to these epics were in high esteem[2].

Prostitutes were not looked down upon by the kings, religious teachers or society in general. Some of them were highly accomplished in fine arts. Compared to our present times, there was no shame and degradation attached to their profession. In Kautilya'sArthasastra we find several rules and regulations which protected them from exploitation and misery. According to Arthsastra a 'ganika' was a government servant[3]. They were given salary. A 'ganika' was highly accomplished person, well- versed in sixty-four arts, bold and cunning.

So what happened to their respect, importance and protection?

"*Frailty, thy name is woman*", was the ignominy heaped upon women of Victorian era by William Shakespeare in his great work Hamlet. The history of sociology has, however, treated them as a symbol careness, love, self -sacrifice. There have been many successful women in India from Indira Gandhi to Priyanka Chopra. But, amid, the successful category of women, a class of women is trapped as victims of circumstances, unfounded social sanctions, family problems, handicaps and coercive forms in the flesh trade, optimized as 'prostitutes' , 'fallen women'.

Prostitution in the society has not been an undiscovered phenomenon; it is of ancient origin and has its demonstration in diverse forms with varied degree unfounded on so called social sanctions.The victims of the trap are the poor, illiterate and ignorant sections of the society and are the most easy target group in the sex trade. They are either socially, economically, mentally weak and are easy to convince or force. Stigmatization is a huge hurdle in accessing their rights. The general public such as prostitute, harlot, sex worker, call girl, hooker, whore, tawaif has given them many a name, escort.The prostitute has always been a commodity and was never seen as complete human being with dignity of person; as if she has no necessity and hopes of her own, individually or collectively.

1. ROSEN F, RIGVEDA 123 (LONDON 1893).
2. GRIFFITH R.T.H, TRANS. IN TO ENGLISH, RAMAYANA 389 (1915).
3. SHAMASASTRY R, KAUTILYA ARTHSASTRAM 179 (1924).

They are just seen as a flesh of meat who can meet sexual desires. Their problems are mingled by coercion laid around them and agonizing treatment meted out to them. Sometime the coercion is physical in nature sometimes it is mental and emotional. When they make attempts either to

combat the prostitution or to relieve themselves from the trap, they breakdown to the violent treatment and resultantly many accept prostitution as their faith. Even if someone comes out of the trap, in any manner, the society is never ready to accept her. The violence of stigmatization and discrimination either makes it impossible to start a new life again or pushes her back to the same job.

Prostitute is equally a human being. Despite that trap, she is encountered with the problems to bear and rear the children. The limitations of trade defy them in bringing up their children, whether male or female. Their children are equally subjected to inhuman treatment and are subjected to discrimination, social and isolation. They are deprived of their right to live normal life for no fault of their own. They suffer a great deal for no fault of theirs. Money has become the need of the day for everyone. It is easy by prostitution and therefore we find more and more cases of prostitution.

Eradication of prostitution in any form is integral to social weal and glory of womanhood. Therefore, it is the duty of the state and all voluntary non-governmental organizations and responsible citizens to come in to their aid to save them from prostitution, rehabilitate them with a helping hand to lead a life with dignity of a person, self - employment through the provisions of education, financial support. Marriage is another object to give them real status in the society. Acceptance by the family is also another important input to rekindle the faith of self- respect and self- confidence. Housing, legal aid, free counseling assistance and all other similar aids and services are meaningful measures to ensure that unfortunate fallen women do not again fall into the trap of red light area contaminated with foul atmosphere. Law is social engineer. Judiciary is required to help regaining social order and stability. Executives, governmental organizations, non-governmental organizations and the general public all have to come together to improve the condition of sex workers and gave them a human life which have full right of. As those who somehow get into prostitution are almost always innocent person.

Prostitution is a curse

Violence against prostitutes is very common. Women are seen as commodities. They are at high risk of violent crime, probably at higher risk of occupational mortality than any other group of women. Executioners include violent clients, pimps, and corrupt law-enforcement officers.

Prostitutes themselves often take their clients to out of the way place where they are less likely to be interrupted, which is easy for their attackers. Being criminals in most jurisdictions, prostitutes are less likely than the law- abiding to be looked for by police if they disappear.

Virgin girls have been subjected to a 'break in' process where the victim is raped and subjected to sexual intercourse by the brothel manager or anybody in command and control of the brothel, as and when she is brought to the brothel. Also, there is a misconception popular among people that *having sex with a 'virgin girl' can cure the disease of AIDS*. The sense of rejection, betrayal and numbness that a women or a girl goes through is beyond comprehension. The girl succumbs to this and accepts prostitution as her way of life. The victims are deprived of all those rights which are considered to be an essence of civilized life and society:

- Deprivation of the right to life
- Denial of the right to just and favorable conditions of work
- Deprivation of dignity
- Denial of the right not to be subjected to torture, or other cruel, inhuman or degrading treatment or punishment.
- Deprivation of the right to access to justice and redressal of grievances.
- Denial of access to health services
- Denial of the right to the highest standard attainable of physical and mental health.
- Denial of right to self – determination
- Denial of right to return to own community.
- Denial of the right to equal protection under the law
- Deprivation of the right to be free from all kinds of discrimination
- Denial of access to justice and delivery of justice
- Denial of reproductive choices
- Denial of the right to brought up children in just and fair environment
- Denial of the right to equality
- Denial of the right to education
- Denial of the right to employment
- Denial of the right of protect against economic deprivations

- Denial of the right to liberty
- Denial of the right to security

The list of violations of rights is long and severe. But the fight is not only for rights, it is also for changing the mindset of society so that they can accept the victims of prostitution open hearted. It is more sociological, than legal. As a victim of prostitution goes through many psychological ups and downs, mostly downs. It is not possible to wholly fathom the mind of the victim depending on the circumstances to which she was exposed during and after. Their body does not belong to them anymore. However, following are some common conditions faced by sex workers:

- Alienated from near and dear ones
- Debt bonded
- Deprived of entertainment
- Deprived of hygiene
- Deprived of medical care and attention leading to further complications.
- Deprived of normal routine
- Displaced from the community
- Fear of rejection from family and society.
- Infected with several diseases
- Instead of providing them with approved conditions, they are mostly thrown at the feet of more vulnerable conditions.
- Isolated
- More often law enforcement does not catch up with the real offenders at all, but tends to victimize the victims.
- Physically assaulted/injured/wounded
- Psychologically/emotionally disturbed, with thoughts and feelings
- Raped or sexually assaulted/abused/violated
- Starved of proper food
- Starved of sleep and rest

- Subjected to forceful addictions of tobacco, smoke, drugs, alcohol, spurious addictives etc.
- Subjected to miscarriage/abortion
- Subjected to psychiatric disorders.

Human Rights

Human Rights are a package of "Rights that belong to an individual as a consequence of being human[1]". The recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of human rights. Human rights are moral principals which describe certain standards of human behavior.Human rights are part and parcel of human dignity which is adequately secured by various national and international laws.

The Constitution of India, the supreme law of land, itself contains almost all basic human rights, either in the form of fundamental rights or by other means, which are available to all its citizens and few to aliens too. One such fundamental right is 'Right to life and personal liberty[2]'. The importance of the concept of human dignity is well exemplified by its inclusion in its national and inter-national basic legal texts. The preamble of the Constitution of India assures, among other things, such as "dignity of the individual".

Basically, people think because you are working as a sex worker you are not a person and they can treat you how they want. That's how they lose heart. They are not looked as a person. They are just looked as a thing, a piece of meat.

There are certain places they can't go with any of the other girls, so if anything happens to them and they are not even allowed to go near the police station. Because police sometime misbehave with them. Some sex workers would need education about that because some women don't realize that they are doing harm to anybody, when they are doing what they are doing, because they have been brought up in a kind of lifestyle that is totally different to the norm. They don't know about anything else. They don't know the pros and cons of what they are doing.

Laws on violence against women

Indian legislation does not define prostitution particularly anywhere.

Prostitution per se is not illegal in India. Immoral Traffic (Prevention) Act, 1956, the main statute dealing with sex work in India, does not criminalize prostitution or prostitutes per se.

1. BRITANNICA READY REFERENCE ENCYCLOPEDIA 82 (2005).
2. THE CONSTITUTION OF INDIA. Art.21.

But it makes certain acts facilitated by third parties relating to prostitution an offence such as pimping, trafficking, brothel keeping and soliciting for sex.

The United General Assembly defines:

Violence against women means "any act of gender- based violence that results in, or is likely to result in, physical, sexual or mental harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private[1]".

Trafficking is the most common cause of violence against women. According to the SAARC Convention on Preventing and Combating Trafficking in Women and Children for Prostitution, 2002[2], 'Trafficking' means moving, selling or buying women and children for prostitution within and outside a country for monetary or other considerations with or without the consent of the person subjected to trafficking.

The offence of trafficking also finds an explanation in Section 5 of Immoral Traffic (Prevention) Act, 1956 which speaks about procuring, taking and/or inducing a person for the sake of prostitution. According to this section, even an attempt to procure and take or cause a person to carry on prostitution amounts to trafficking.

As per the Indian Law Section 2 of Immoral Traffic (Prevention) Act, 1956 brothel includes any place or part thereof or any conveyance used for commercial sex exploitation. Therefore even parlour where sexual exploitation takes place under the façade of message, or a car hired by the exploiters to carry on commercial sex exploitation, will also be legally construed as brothels.

As per Convention on Elimination of All Forms of Discrimination Against Women (CEDAW), "All states are obliged to prevent and eliminate all forms of violence against women and girls".

Also Beijing Declaration, Platform for Action, and the United Nation World Conference on Women, China, 1995 gave a mandate to all member countries of the United Nation to devise action plan against 'violence against women'. Most of the countries in the region have rectified

Convention on Elimination of All Forms of Discrimination Against Women (CEDAW) but some have refused too.

Violence against women is one of the most pervasive human rights violations in the world and should be prevented to ensure that women and girls lead healthy and productive lives and that their human rights are upheld. It leads to physical, mental, sexual and reproductive health problems for individuals and enormous social and economic cost for societies.

There is another Indian legislation: The Indecent Representation of Women (Prohibition) Act, 1986 which was enacted by parliament to prohibit indecent representation of women through advertisements or in publication, writings, paintings, figures or any other matter. It extends to the whole of India except the State of Jammu and Kashmir.

Work place of sex workers

Based on the place of exploitation, and as per the existing public perception, prostitution can be classified into brothel based and non- brothel based.

Brothel based sexual exploitation means commercial sexual activity taking place in brothels. Brothels may be situated in a colour of brothels, usually referred to as 'red light area' or they may exist independently.

Non- brothel – based sexual exploitation takes place where commercial exploitation takes place in those places where commercial exploitation takes place under the facade of some other genuine activity. In the common parlance this could include message parlours, beer bars, friendship clubs, tourist circuits, beauty parlour, etc. where sexual favors are made to be provided to the exploiters by the trafficked victim.

It is a misnomer to call such activities as 'non-brothel- based prostitution'. Nevertheless, the common perspective remains the same and, therefore, their nomenclature is futile."

The World Health Organization reports that violence against women put an undue burden on health care services with women who have suffered violence being more likely to need health services and at higher cost, compared to women who have not suffered violence. Violence and abuse can cause terrible physical and emotional pain.

Classification of sex business on the basis of consent

- FORCED PROSTITUTION/VOLUNTARY PROSTITTUTION

Forced prostitution is the act of performing non- voluntary sexual activities due to coercion by a third party. There are a wide range of entry routes into prostitution, ranging from "*voluntary and deliberate*" entry, "*semi-voluntary*" based on pressure of circumstances, and "*involuntary*" recruitment via outright force or coercion. It refers to the conditions of control over a person who is coerced by another to engage in sexual activity.

Due to the illegal nature of prostitution and the different methods used in separating forced prostitution from voluntary prostitution, the extent of this phenomenon is difficult to estimate accurately.

- SEXUAL SLAVERY

It is the slavery of unwilling people for sexual exploitation. It is a particular form of enslavement which includes limitations on one's autonomy, freedom of movement and power to decide matters relating to one's sexual activity. The crime also includes forced marriages, domestic servitude or other forced labor that ultimately involves forced sexual activity.

Most, if not all, forms of forced prostitution may be viewed as a kind of sexual slavery. The terms "forced prostitution" or "enforced prostitution" appear in international and humanitarian conventions but have been insufficiently understood and inconsistently applied. "Forced prostitution" generally refers to conditions of control over a person who is coerced by another to engage in sexual activity.

Human trafficking: a major cause

Sex trafficking is highly gendered. Women and children are trafficked mostly for sexual exploitation. No matter the destination country, living conditions for trafficked victims are reported to be close to what is called "slavery or modern slavery". Women have been forced into prostitution; their freedom of movement has been restricted; they have no personal documents; they have been isolated from other people and subjected to supervision and also locked up in their rooms, or in a brothel, in hostels etc. An additional element is that they have been intimidated, since traffickers often threaten to harm their families. Speaking on victims of trafficking, the human rights position has to be given a central role.

Government views trafficking like an organized crime, problem of migration and/or prostitution, rather than the human rights abuse. Victims of trafficking are mostly seen as criminals, not as

victims who are forced or trapped into illegal activities. No women would love to sell her body. BLURED BOUNDARIES contribute to a criminalization process that affects the victims.

Factors, which make them more appropriate subject for vulnerability[1]:

- Illiteracy and lack of education
- Lack of awareness of rights
- Uneven economic situations: this means the schism between the haves and have- nots is so wide and vast that the latter are rendered vulnerable.
- Natural calamities
- Man-made calamities
- Trafficking triangle: trafficking according to Phinneyis caused by the trafficking triangle, constituted by the space created by demand- supply- impunity. According to Phinney, "sex trafficking is driven by a demand for women and children's body in the sex industry, followed by a supply of women who are denied equal rights and opportunities for education and economic advancement, and perpetuated by traffickers who are able to exploit human misfortune with near impunity."
- An antithesis to civilization
- Legislation and implementation
- Culture of silence
- Discrimination practices and social exclusion
- Poverty and economic distress
- Belonging to the family of prostitute.

How world reacts to sex workers business:

With regard to prostitution, three worldviews exist:

- Abolitionism (where the prostitutes considered as a victim)
- Regulation (where the prostitute is considered a worker)
- Prohibitionism (where the prostitute is considered a criminal)

All forms of involuntary prostitutions are regarded as an offence under customary laws in all countries. While the legality of adult prostitution varies between different parts of the world, the prostitution of children is illegal nearly everywhere in the world.

1. NAIR Dr. P.M, HUMAN TRAFFICKING 50-55 (KONARK PUBLISHERS PVT LTD DELHI).

HIV, human trafficking and sex worker

The relationship with HIV is more intimate, pronounced and real. Victims may be unaware of having contracted HIV. Medical check- ups and treatments seldom exist, as is the case with prevention methods. Sexual exploitation by multiple persons, especially unprotected sex, makes the victims of trafficking highly vulnerable to HIV. The sexual predators carry HIV to other women, including their spouses. There is a *snowballing effect*. Once it is know that the woman has contracted HIV, she becomes an 'unwanted commodity' and is virtually 'thrown out'. This adds up in the process of degradation.

Measures taken to strengthen the condition of sex workers:

Recently there have been several efforts to gain legal recognition for sex workers. In the Netherlands, Germany, New Zealand and some Australian State sex workers enjoy recognition by their government. In India, prostitution per se is not illegal.

One school says legalization will help lower the victimization rate of the workers, also reducing and preventing the transmission of HIV and other sexually transmitted diseases among the workers and their clients. Illegal sex tourism with under- age boys and girls has become a notorious problem. And criminalization has failed in controlling it.

The term sex worker was brought into use by sex worker rights activists who want society to recognize the work they do and their contributions.

Laws can be changed and programs enacted that better protect victims of abuse, raise the social cost to the abuser, and influence cultural values. Perhaps most important, however social attitudes must change so that woman gain greater control over their own bodies, over economic and family resources, and over their lives in general.

Factors controlling demand

- Effective law enforcement
- Awareness of public
- Involvement of Panchayats and grasssroots democracy
- Naming and shaming: wide publicity against the abusers and offenders is another and effective method of controlling demand. Publicity will send fear into fence-sitters and also motivate those who are fighting the cause.
- The convicted person needs to be given stringent punishment, so that the fence-sitters realize the gravity of the impending danger.

Structural and institutional responses to the prostitution include legal regime, administrative structures and related institutions which are already in place. The legal regime includes laws, rulings and judgments of the Supreme Court and High Courts etc. The administrative structure includes circulars, guidelines, and standing orders by the various departments, ministries or their subordinate agencies as well as the institutions that have been set up for addressing the various issues. The institutions include government departments, agencies, quasi-government agencies as well as the civil society organizations which have been authorized to attend to certain tasks.

Suggestive Measures

Human Rights are those rights, which no one can take away from someone and no one can give to someone. It remains and should remain with a person by the virtue of being a member of human race.*So why are we discussing about human rights of sex workers? What caused the need to give someone something, which she should posses by the virtue of being born as a human?*

Society has not yet called off their old ethics. And it is the bitter truth that prostitution has existed, it exists and it will exist forever. So stigmatization and discrimination will not serve any purpose!

The Constitution of India, special acts such as Immoral Traffic (Prevention) Act, 1956, provisions of Indian Penal Code, International conventions/ treaties/ declarations/ conferences/ agreements and many other laws, even if considered as all together have not been enough to improve the condition of sex workers. A plethora of legislations has been futile. The sex workers are still forced to live inhuman life and are subject to continuous exploitation.

Now, the question arises what else should be done?

These are few conditions, which can act as solutions:

- Change in the mindset of society
- Positive attitude of policemen
- Police must not interfere or take criminal action against adult sex workers participating with consent
- Whenever a sex worker makes a complaint, police must take it seriously and act in accordance with law
- Positive attitude of lawyers specially defence lawyers
- No preconception either in the mind of bar or bench
- Strong and effective rehabilitation policies
- Providing some source of livelihood
- Teaching victims new skills and encouraging them
- A proper and clear classification between voluntary and involuntary prostitution
- Effective rescue planning and execution
- Providing proper health facilities
- Proper care and standard environment with all basic facilities to the children of prostitutes.
- Keeping and maintaining records of victims trapped, victims rescued, victims rehabilitated.
- Housing facilities
- Free legal aid
- Counseling facilities
- Prevention, Protection, Prosecution be the 3Ps that should be the motive
- Those who facilitate prostitution or push innocent female into prostitution should be duly and strictly prosecuted
- Recognition for those who work in this field
- Appreciation and monetary awards for Governmental and Non- governmental organizations and also for individuals working actively in this field

- Involvement of not only state government and central government or that of Governmental and Non-governmental organizations, social workers, but also of local self governments both at rural and urban levels
- Active participation of general public and youth
- For this purpose, several awareness camps, street plays should be organized
- Last but not the least, proper funding from both central and state governments for this purpose.

There are many views regarding legalization and de-legalization of prostitution. But the fact is that prostitution will always exist in the society. Prostitution can't be stopped, it is a bitter truth. And with criminalization of prostitution, it has been seen that there is more harm than legalization. If law cannot curb it, then legalize it.

Benefits of legalizing prostitution:

- Licensing
- Registration
- Mandatory health check-ups
- Minors will be protected
- Reduce the number of rapes and other sexual assaults
- Employment rights
- Minimum wages
- Leaves, medical and other facilities
- Elimination of forced prostitution
- Taxation
- Reduce child trafficking
- Better police control
- Right of workers will get easily protected.

  But as every coin has two sides. So does legalization too has. They are:
- Could motivate young generation to join this hellish job
- Multiple abortions
- Threat of Sexually transmitted diseases.

Conclusion

Women 'The Naaree' is an imperial creation of God, a multi tasking arena and transmitter of versatility, uprightness, and benevolence. She is companion of man, gifted with equal mental faculty; cater with a protective shield, the avatar of love, care and affection. She is the pillar, which holds family and society together. Woman comprises more than 50% of the globe's population; in spite of this they enjoy only 1% of the world's wealth.

Ancient India has always depicted women at high place of respect in the society as mentioned in Rigveda and eminent scriptures. But with the time the women has been exploited in every sense. India is a country where female are pictured as a goddess at one side and also treated as an animal on another side.

ALL ABOUT DUE PROCESS OF LAW[1]

Abstarct

In general terms the words "due process" means a process which is just, fair and reasonable. In a democracy where the Government is of the people, for the people and by the people, due process is a non-parting element. If a Government has to show that they are a real democratic Government then every procedure of the Government which deprives any of rights of its citizens must be just, fair and reasonable. In this paper the author has gone back to the roots of due process and discussed the provisions of Federal Constitution of United States which are consisting the Due Process Clause. The author has also discussed some of the cases through which the Due Process Clause has been interpreted by the Supreme Court of United States. In the later part of the paper the author has discussed the circumstances in which the due process has been interpreted to be enshrined within the Constitution of India. The Constitution of India does not have specific words "due process" in any of its provisions but the Supreme Court of India has interpreted Art 21 of the Constitution in such way that the due process has been deemed to be part of Constitution of India from the very inception. The author has discussed many cases decided by the Supreme Court of India in which the issue was whether Indian Constitution is having the Due Process Clause or not. The whole development of due process in India has been discussed in this paper. Finally the paper discusses some of the cases of 21st century which acclaim that the Constitution of India impliedly contains the Due Process Clause.

Key-Words: Due Process Clause, Democracy, Constitution, Supreme Court, Government

Introduction

Due process of law, as the meaning of the words has been developed in American decisions, implies the administration of equal laws according to established rules, not violative of the fundamental principles of private right, by a competent tribunal having jurisdiction of the case

[1]Mradul Mishra, Assistant Professor (Research), Gujarat National Law University, Gandhinagar, Gujarat

and proceeding upon notice and hearing. The phrase is and has long been exactly equivalent to and convertible with the older expression "the law of the land".

The basis of due process, orderly proceedings and an opportunity to defend, must be inherent in every body of law or custom as soon as it advances beyond the stage of uncontrolled vengeance. Indeed, the emphasis placed on a literal adherence to customary rules of procedure is one of the most marked features of primitive law and with the advance of civilization and the application of reflection to old collections of custom, the principle of notice and an opportunity to defend would take its place as a part of the jus gentium, to become later the law of nature, or the law of God. The idea was familiar to the Jewish law, and in the Roman law may be discovered underlying the conception of "justice," as "the steadfast and continued disposition to render to every man his rights."

But whatever may be the case in other systems, due process is fundamental in American law and under the Constitution of the United States, as under the constitutions of the individual States, no person can be deprived of life, liberty, or property without due process of law, or except by the law of the land.

As we shall see, several of the elements of this general characterization have been developed by the courts in seeking the real content of due process of law as the phrase is adopted in our constitution from the US law. But there the same exigency for determining the latent meaning of the words did not exist. It was used as equivalent to the law of the land and imported in every due and regular proceeding in accordance with statute or common law, implying notice and hearing.

The puzzle this work seeks to explain is the emergence of due process jurisprudence in the Indian context in the late 1970s, despite the deliberate omission of a “due process” clause from Article 21 of the Indian Constitution by its framers, the Constituent Assembly. How did the Indian Supreme Court overcome the lack of a due process clause, a prolix Constitution designed to limit the power of the Court and a legacy of positivism and parliamentary sovereignty inherited from British rule to develop a doctrine of due process?

Leading scholarship on Indian law highlights the significant shift from a more formal, positivist interpretive approach to the Indian Constitution, exemplified by the Court's decision in*A. K. Gopalan v. State of Madras*[1], to the more expansive approach adopted by the Indian Court in *Maneka Gandhi v. Union of India*[2] in which the court adopted an activist approach to interpreting the fundamental rights and effectively created new doctrines of due process and non-arbitrariness. What the literature highlighted as groundbreaking in Maneka Gandhi case was the court's recognition of "an implied substantive component to the term "liberty" in Article 21 that provides broad protection of individual freedom against unreasonable or arbitrary curtailment.

Due Process under the Federal Constitution

In the Federal Constitution the words "due process of law" occur at two places:

In the Fifth Amendment: The first is in the Fifth Amendment to the Constitution, one clause of which provides that no person shall "be deprived of life, liberty or property without due process of law. " The other provisions of this amendment guarantee trial by jury in cases of capital or infamous crime, and forbid double jeopardy, compelling a person to be a witness against himself, or the taking of private property for public use without just compensation.

The first ten amendments to the Federal Constitution were a concession to the fears of a generation which had taken part in the evolution. The struggle with England for rights, held to be the sacred inheritance of all free English subjects, had left the States and the people of the country keenly alive to the value of liberty and profoundly jealous and distrustful of centralized power. The feeling was widespread that under the Constitution as proposed the States were weakened and a place left for encroachments which might in time end in their absorption into the Federal Government. Under these circumstances ratification of the Constitution by the requisite number of States was secured only by an understanding that amendments would be adopted declaring the rights of the people and restricting the powers of the general government. In pursuance of this understanding a proposition to amend the Constitution was brought forward by

[1](1950) SCR 88.
[2](1978) SCR (2) 621.

Mr. Madison[1] in the First Congress, and the first ten amendments were framed and ratified by the requisite number of States in December 1791.

These amendments do not affect the powers of the States in respect to their own people, but limit the powers of the general government alone. “The Constitution," said Chief Justice Marshall[2] in the case of *Barron v. Baltimore*[3] in 1833, "was ordained and established by the people of the United States for themselves, for their own government, and not for the government of the individual States. Each State established a constitution for itself, and in that constitution provided such limitations and restrictions on the powers of its particular government as its judgment dictated. The people of the United States framed such a government for the United States as they supposed best adapted to their situation and best calculated to promote their interests. The powers they conferred upon this government were to be exercised by itself; and the limitations on power, if expressed in general terms, are naturally, and, we think, necessarily applicable to the government created by this instrument. They are limitations of power granted in the instrument itself; not of distinct governments framed by different persons and for different purposes."

In the Fourteenth Amendment: In very different circumstances of their national life, was adopted as a part of the Federal constitution the Fourteenth Amendment, in which the phrase "due process of law" occurs again. This amendment belongs to the group, the Thirteenth, Fourteenth, and Fifteenth Amendments, by which the results of the struggle of the Civil War were secured and rendered permanent. By the Thirteenth Amendment, which declares that "neither slavery nor involuntary servitude, except as a punishment for crime where the party shall have been duly convicted, shall exist within the United States, or in any place within its jurisdiction," the freedom of the Negro race was assured, but their rights were at the mercy of State legislation. Some of the former slave States passed laws especially directed against the Negro race, and imposing various disabilities on former slaves. In some instances they were denied the right to appear in the towns, except in the capacity of menial servants. They were denied the right to purchase land. They were not permitted to testify in cases where a white man was a party. It was felt that national protection was necessary for the freedmen, and the

[1] James Madison Jr was IVth President of United States.
[2] John Marshall was IVth Chief Justice of Supreme Court of United States.
[3] 32 U.S. 243 (1833)

Fourteenth Amendment was proposed to the States, and declared ratified in July 1868. Its first section is as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Thus it will be seen that the Fourteenth Amendment was broader in its scope than the wrongs by which it was occasioned. "It had its origin in a purpose to secure the newly made citizens in the full enjoyment of their freedom," said Mr. Justice Field[1] in the case of *Pennoyer v. Neff*[2], "but it is in no respect limited in its operation to them. It is universal in its application, extending its protective force over all men, of every race and color, within the jurisdiction of the States, throughout the broad domain of the Republic." "All history," continued the learned Justice, "shows that a particular grievance suffered by an individual or a class, from an oppressive or defective law, or the absence of any law touching the matter, is often the occasion of and cause for enactments, constitutional or legislative, general in their character, designed to cover cases not merely of the same, but all cases of a similar nature. The wrongs which were supposed to be inflicted upon or threatened to citizens of the enfranchised race, by special legislation directed against them, moved the framers of the amendment to place in the fundamental law of the nation provisions not merely for the security of those citizens, but to insure to all men at all times and in all places due process of law and the equal protection of the laws. Oppression of the person and spoliation of property by any State were thus forbidden, and equality before the law was secured to all."

Kinds of Due Process

Procedural Due Process: The phrase "procedural due process" refers to the aspects of the Due Process Clause that apply to the procedure of arresting and trying persons who have been accused of crimes and to any other government action that deprives an individual of life, liberty, or property. Procedural due process limits the exercise of power by the state and federal

[1] Stephen Johnson Field was an Associate Justice of the Supreme Court of United States.
[2] 95 U.S. 714 (1878).

governments by requiring that they follow certain procedures in criminal and civil matters. In cases where an individual has claimed a violation of due process rights, courts must determine whether a citizen is being deprived of “life, liberty, or property”, and what procedural protections are “due” to that individual.

The Bill of Rights contains provisions that are central to procedural due process. These protections give a person a number of rights and freedoms in criminal proceedings, including freedom from unreasonable searches and seizures; freedom from double jeopardy, or being tried more than once for the same crime; freedom from self-incrimination, or testifying against oneself; the right to a speedy and public trial by an impartial jury; the right to be told of the crime being charged; the right to cross-examine witnesses; the right to be represented by an attorney; freedom from cruel and unusual punishment; and the right to demand that the state prove any charges beyond a reasonable doubt. In a series of U.S. Supreme Court cases during the twentieth century, all of these rights were applied to state proceedings. In one such case, *Gideon v. Wainright*[1], the Court ruled that the Due Process Clause of the Fourteenth Amendment incorporates the Sixth Amendment’s right to have an attorney in "all criminal prosecutions," including prosecutions by a state. The case proved to be a watershed in establishing indigents' rights to legal counsel.

The U.S. Supreme Court in *Lujan v. G&G Firesprinklers, Inc*.[2], held that a state is not required to hold a hearing before withholding money and imposing penalties on a building contractor. The California Division of Labor & Standards Enforcement determined that a building subcontractor had failed to pay the prevailing wage to workers who installed fire sprinklers in state buildings. The California agency, without providing notice or a hearing, fined the general contractor, which in turn withheld money from the subcontractor. The sub-contractor, G&G Firesprinklers, Inc., sued the California agency, claiming that the agency had violated the company's procedural due process rights. The Court disagreed, holding that because the company could sue the agency for breach of contract, the fine did not constitute a due process violation.

[1] 372 U.S. 335 (1963).
[2] 532 U.S. 189 (2001).

Substantive Due Process: Substantive due process as the phrase connotes, asks whether the government has an adequate reason for taking away a person's life, liberty or property. In other words substantive due process looks to whether there is a sufficient justification for the government's action. The modern notion of substantive due process emerged in decisions of the U.S. Supreme Court during the late nineteenth century. In the case of *Allgeyer v. Louisiana*[1], the Court for the first time used the substantive due process framework to strike down a state statute. Before that time, the Court generally had used the Commerce Clause or the Contracts Clause of the Constitution to invalidate state legislation. The Allgeyer case concerned a Louisiana law that proscribed the entry into certain contracts with insurance firms in other states. The Court found that the law unfairly abridged the right to enter into lawful contracts, as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The next 40 years after Allgeyer were the heyday of what has been called the freedom-of-contract version of substantive due process. During those years, the Court often used the Due Process Clause of the Fourteenth Amendment to void state regulation of private industry, particularly regarding terms of employment such as maximum working hours or minimum wages. In one famous case from that era, *Lochner v. New York*[2] , the Court struck down a New York law that prohibited employers from allowing workers in bakeries to be on the job more than ten hours per day and 60 hours per week. The Court found that the law was not a valid exercise of the state's police power. It wrote that it could find no connection between the number of hours worked and the quality of the baked goods, thus finding that the law was arbitrary.

By the 1960s, the Court had extended its interpretation of substantive due process to include rights and freedoms that are not specifically mentioned in the Constitution but that, according to the Court, extend or derive from existing rights. These rights and freedoms include the freedoms of association and non-association, which have been inferred from the First Amendment's freedom-of-speech provision, and the right to privacy. The right to privacy, which has been derived from the First, Fourth, and Ninth Amendments, has been an especially controversial aspect of substantive due process. In the year 1965 the Supreme Court of United states, in

[1] 165 U.S. 578 (1897).
[2] 198 U.S. 45 (1905).

Griswold v. Connecticut[1], invalidated one Connecticut Statute that prohibited any person from using any drug, medicinal article or instrument for the purpose of preventing conception holding that it violates the right to marital privacy.

In several recent decisions, the U.S. Supreme Court has considered the application of substantive due process in light of actions taken by law enforcement officers. It often has determined that police actions have not violated a defendant's due process rights. In County of *Sacramento v. Lewis*[2], for example, the Court determined that high-speed chases by police officers did not violate the due process rights of the suspects whom the officers were chasing. In that case, two police officers had engaged in a pursuit of two young suspects at speeds of more than 100 miles per hour through a residential neighborhood. One of the young men died, while the other suffered serious injuries. A unanimous Court held that the officers' decision to engage in the pursuit had not amounted to "governmental arbitrariness" that the Due Process Clause protects due to the nature of the judgment used by the officers in such a circumstance.

The U.S. Supreme Court is more likely to find due process violations where the actions of a government official are clearly arbitrary. In *City of Chicago v. Morales*[3], for example, it struck down a Chicago anti-gang ordinance as unconstitutional on due process grounds. The ordinance allowed police officers to break up any group of two or more persons whom they believed to be loitering in a public place, provided that the officer also believed that at least one member of the group was a gang member. The ordinance had led to more than 43,000 arrests. Because the ordinance did not draw the line between innocent and guilty behavior and failed to give guidance to police on the matter, the ordinance violated the due process rights of the subjects of these break-ups. The Court held that since the ordinance gave absolute discretion to the police officers to determine what actions violated the ordinance, it was an arbitrary restriction on personal liberty in violation of the Due Process Clause.

Distinction between Procedural and Substantive Due Process:

[1] 381 U.S. 479 (1965).
[2] 523 U.S. 833 (1998).
[3] 527 U.S. 41 (1999).

The distinction between procedural and substantive due process can be understood with the example of constitutional rights of parents to custody of their children. It is undisputed that parents have a liberty interest in the custody of their children. Therefore procedural due process requires that the government provide notice and a hearing, and that there be a clear and convincing evidence of a need to terminate the custody, before parental rights are permanently ended. Because the right to custody is deemed a fundamental right, substantive due process requires that the government prove that terminating custody is necessary to achieve a compelling purpose, such as the need to prevent abuse or neglect of a child.

Another example of the distinction between procedural and substantive due process can be found in challenges to large punitive damage awards. Procedural due process requires that there be safeguards such as instructions to the jury to guide their discretion, and judicial review to ensure the reasonableness of the awards. Substantive due process prevents excessive punitive damage awards, regardless of the procedures followed.

Thus it is possible to distinguish procedural and substantive due process based on the remedy sought. If the plaintiff is seeking to have a government action declared unconstitutional as violating a constitutional right, substantive due process is involved. But when a person or a group is seeking to have a government action declared unconstitutional because of the lack of adequate safeguards such as notice and a hearing, procedural due process is the issue.

Development of Due Process in India

In the Constitution of India Art. 21 says that “No person shall be deprived of his life or personal liberty except according to procedure established by law”. So under Indian constitution words “procedure established by law” have been used in place of words “due process of law” as they are used in the U.S. constitution. When the constitution started to work, the judiciary also decided cases according to the “procedure established by law”. But later it realized that justice has not been done if the case is decided as per the provisions then existing in the constitution and later on in many cases the Supreme Court of India has decided that words “procedure established by law” also covers “due process of law”. From A K Gopalan case to Maneka Gandhi case how the Indian Supreme Court has shifted from “procedure established by law” to “due process of

law" and how they have adopted decisions of U.S. courts in the Indian scenario, now we will look into this aspect:

1. A. K. Gopalan v. State of Madras[1]

A. K. Gopalan v. State of Madras was a significant decision because it was the the first case in which the Court meaningfully examined and interpreted key Fundamental Rights provisions of the Constitution, including Articles 19 and 21. The key issue raised in this case, through a petition for habeas corpus, was whether several provisions of the Preventive Detention Act of 1950, under which Mr. A K Gopalan was detained, violated his fundamental rights pursuant to Articles 13, 19, 21, and 22. In order to decide this issue the various judges in the majority of this early case each consider alternative interpretive approaches for determining the scope of the term "personal liberty" contained in Article 21, and whether the preventive detention statute impermissibly infringed on the petitioner's freedom of movement under Articles 19 and 21. Writing for the majority, Chief Justice Kania[2] effectively restricted the scope of fundamental rights by reading the fundamental rights in isolation and separately from Article 21 (the "procedure established by law" provision), and Article 22, which provided guidelines for preventive detention.

Thus it was contended in this case that the expression procedure established by law in Art. 21 was synonymous with the American concept of procedural due process. The Supreme Court rejected the contention on two bases:Firstly the word due was absent in Art. 21; Secondly the draft Constitution had contained the words due process of law but these words were later dropped and the present phraseology adopted instead.

Thus in this case the Supreme Court laid down ruling that to deprive a person of his life or personal liberty:

1. there must be a law;

2. it should lay down a procedure;and

[1](1950) SCR 88.
[2] Sir Harilal Jekisundas Kania was the first Chief Justice of India.

3. the executive should follow this procedure while depriving a person of his life or personal liberty.

In contrast to the majority, Justice Fazl Ali's dissenting opinion adopted a much more expansive interpretation of the phrase "procedure established by law" in Article 21. Whereas the majority read Articles 19, 21 and 22 as being separate, Justice Fazl Ali argued for a broad, structural reading of the Constitution whereby the fundamental rights contained in Article 19 are read in conjunction with Articles 21 and 22, which provide, respectively, for procedure established by law and for specific procedures for preventive detention.

***2. Kharak Singh v. State of U.P.*[1]**

In *Kharak Singh v. State of Uttar Pradesh*, the court considered the constitutionality of five provisions of an Uttar Pradesh State Regulation 236, which delineated procedures for nighttime "domiciliary visits" and police surveillance of a suspect's home. Writing for the majority, Justice Ayyangar held that the domiciliary visits provision violated Article 21 of the Indian Constitution, because, based on American case *Wolf v. Colorado*[2], "an unauthorized intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man.

What is interesting in this case is the use of American substantive due process opinions or precedents in both the majority and dissenting opinions. Both opinions extracted language out of U.S. Supreme Court Justice Stephen Field's dissenting opinion in the U.S. decision *Munn v. Illinois*[3], an early economic regulation of property rights decision, in which the majority actually upheld state regulation fixing the price of storage rates for grain elevators and requiring licensing for such facilities, on the ground that the property at issue "was affected with a public interest." Justice Field's dissent in Munn was one of the first decisions in American constitutional history to articulate a conception of substantive due process whereby courts must closely review legislation exercised pursuant to states' police powers where that legislation impinges upon a fundamental right such as the right to property. While the majority in Kharak Singh relies on the

[1](1964) SCR (1) 332.
[2] 338 U.S. 25 (1949).
[3] 94 U.S. 113 (1877).

Munn decision to support a broader conception of the term "personal liberty" than presented in the Gopalan decision, the majority follows the same understanding and construction of the term "procedure established by law" in Article 21 as did the majority in Gopalan. Both majorities refused to recognize that this provision means "due process" and requires notice, opportunity to be heard, a right to an impartial tribunal, and regularized procedures, in addition to allowing for consideration of principles of natural law and justice.

Unlike the majority in Kharak Singh, Justice SubbaRao, joined by Justice Shah, argued that all of the provisions of Regulation 236, including those involving police surveillance, were unconstitutional as violative of Article 19(1) (d) and Article 21. Additionally, Justice SubbaRao's dissent also made reference to two other decisions *Wolf v. Colorado*[1], a case dealing with the permissibility of using illegally seized evidence in state courts under the Fourth and Fourteenth Amendment, and *Bolling v. Sharpe*[2], in which the U.S. Supreme Court ruled that segregating students by race in public schools in the District of Columbia constituted a denial of due process under the Fifth Amendment.

3. Satwant Singh Sawhney v. Assistant Passport Officer, New Delhi[3]

Just three years after his dissent in the Kharak Singh decision, Chief Justice SubbaRao's[4] dissenting position in Kharak Singh effectively became the majority opinion in Satwant Singh Sawhney, a case dealing with a decision by the Indian Government to withdraw passport and travel privileges from an import/export businessman. In impounding Sawhney's passport the Ministry of External Affairs alleged that Sawhney had violated conditions of the import license that had been granted to him by the Indian government, was under investigation for offences under the Export and Import Control Act, and was likely to flee from India to avoid trial. Sawhney challenged the action on the grounds that it infringed upon his fundamental rights under both Article 21 and Article 14 of the Constitution. In a 3-2 decision, the majority (which included Chief Justice SubbaRao, Justice C.A. Vaidalingam, and Justice J.M. Shelat) invalidated

[1] Supra Note 18.
[2] 347 U.S. 497 (1954).
[3] (1967) SCR (2) 525.
[4] Koka Subba Rao was 9th Chief Justice of India.

the Government's withdrawal and impoundment of Sawhney's passport on the grounds that such actions violated both Articles 14 and 21.

Chief Justice SubbaRao's majority opinion in Sawhney marked a turning point in the Court's use of foreign precedent in this area of law - for the first time, the Court was able to author a majority decision and binding precedent in the area of personal liberty that built and relied on foreign precedents dealing with substantive due process. Moreover, Chief Justice SubbaRao used a combination of American precedents, along with the opinions in Kharak Singh, to rule that the term "personal liberty" is as broad in India as the term "liberty" is in the 5th Amendment of the U.S. Constitution.

J. SubbaRao leveraged foreign precedent to support two key legal arguments. First, he invoked two U.S. Supreme Court decisions dealing with passports and the right to travel, *Kent v. Dulles*[1]and *Aptheker v. Secretary of State*[2], to support the proposition that "in America the right to travel is considered to be an integral part of personal liberty." His decision also notes that the United States Supreme Court, in *Kent v. Dulles*, effectively affirmed "that the right to travel is a part of the liberty of which the citizen cannot be deprived without due process of law under the Fifth Amendment."

4. Govind v. State of Madhya Pradesh[3]

In Govind v. State of Madhya Pradesh, the Court considered the constitutionality of Regulations 855 and 856 of Madhya Pradesh Police Regulations made by the Government under the Police Act 1961 which provided for similar police surveillance and domiciliary visits as those at issue in Kharak Singh. Writing for a unanimous panel, Justice K.K. Mathew upheld the regulations and refused to read a fundamental right to privacy into the constitution. J. Mathew's decision took account of the litany of substantive due process cases decided by the United States Supreme Court dealing with privacy and autonomy between 1965 and 1975. He analyzed such landmark decisions as *Griswold v. Connecticut*[4], (holding that a state law criminalizing the use of

[1] 357 U.S. 116 (1958).
[2] 378 U.S. 500 (1964).
[3](1975) SCR (3) 946.
[4] 381 U.S. 479 (1965).

contraceptives was unconstitutional on the grounds that it interfered with the fundamental right of privacy of married couples) and *Roe v. Wade*[1], (holding that a limited right to abortion is encompassed within an implied right of privacy, which must be balanced against competing state interests in protecting the life of the child).

The decision in Govind's case was thus problematic in that it recognized the idea of penumbras and implied fundamental rights, but then refused to accord those rights the same constitutional protection. In effect, the result was to apply a lower level of scrutiny in which the presence of a regulation that serves some compelling public interest is constitutional even if it restricts a fundamental right. Thus, Govind's applied the same restricted view of Article 19 and Article 21 as the Kharak Singh majority, and effectively rejected the development of substantive due process in privacy and autonomy cases in the U.S., adopting much more of native, particularistic view of the law.

5. Maneka Gandhi v. Union of India[2]

The Court launched a new activist approach to interpreting the fundamental rights in *Maneka Gandhi v. Union of India*, the first major decision of the Supreme Court involving personal liberty in the post-Emergency period. In this case, Maneka Gandhi, the daughter-in-law of Indira Gandhi, challenged the seizure of her passport by the Janata Government under Section 10(3)(c) of The Passports Act of 1967. Gandhi challenged the seizure on the grounds that the action violated Articles 14 and 21 of the Constitution by not providing notice or a hearing prior to the impoundment of her passport.

In doctrinal terms, the Maneka Gandhi decision was ground-breaking, in that a six judge majority (with one dissent) voted to broaden the scope of Article 21, the right to equality in Article 14, and the seven "fundamental freedoms" in Article 19.

Maneka Gandhi's case turned away from the more legalistic approach that held the field since the Court's decision in *A. K.Gopalan v. State of Madras*. Writing the lead majority opinion,

[1] 410 U.S. 113 (1973).
[2](1978) SCR (2) 621.

Justice P.N. Bhagwati[1] held that the Court should "expand the reach and ambit of the fundamental rights rather than to attenuate their meaning and content by a process of judicial construction." The Court broke with the Gopalan approach by broadly interpreting the terms "life" and "personal liberty" in Articles 19 and 21, building on its earlier decisions in Kharak Singh and Satwant Singh Sawnhey, in holding that the right to travel outside the country was part of personal liberty. J. Bhagwati argued that, "the expression 'personal liberty' in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19."

Second, the majority in Maneka Gandhi's case read an expansive conception of due process into Article 21 of the Constitution (which the Court refused to do in Gopalan's case). The majority held that any procedure implicating the rights to life and liberty in Article 21 must be "just, fair and reasonable and not arbitrary, fanciful or oppressive" to pass Article 21 scrutiny. J. Bhagwati broke from earlier doctrine in holding that principles of natural justice must be read into Article 21 of the Constitution and require that a petitioner be afforded with reasons a hearing in passport revocation matters. Invoking a familiar technique in Indian constitutional law, J. Bhagwati interpreted Section 10(3) (c) of the Act expansively to uphold it, and held that the Act implies just and fair procedures that comply with the dictates of natural justice. Third, the majority overturnedGopalan's case in ruling that laws that restrict personal liberty would have to pass scrutiny not only under Article 21's requirement of procedural due process, but also under Article 19 (personal freedoms), and Article 14 (non-arbitrariness). As a result, laws or regulations restricting personal liberty must also satisfy the "reasonableness" standard set forth in Article 14 and Article 19.

The Court's decision in Maneka Gandhi was groundbreaking in that it effectively incorporated a due process requirement into Article 21, and also held that the procedures contemplated by Article 21 must also satisfy the requirement of non-arbitrariness mandated under the Court's expansive interpretation of Article 14.

[1] Prafullachandra Natwarlal Bhagwati was 17th Chief Justice of India.

Maneka Gandhi's case thus relied indirectly on American precedent in two critical respects. First, the court accepts the broad and expansive interpretation of personal liberty in Article 21 employed in Kharak Singh's case, which relied on Justice Field's broad definitions of life and liberty in the 5th Amendment, and in Satwant Singh Sawnhey's case, in which the Court relied on J. Field's Munn dissent, as incorporated in Kharak Singh, to find that Article 21 encompasses a right to travel abroad, and "consequently no person can be deprived of this right except according to procedure prescribed by law." Second, J. Bhagwati's opinion relied upon three U.S. Supreme Court decisions namely *Kent v. Dulles*[1], *Aptheker v. United States*[2], and *Zemel v. Rusk*[3] —to reject using a "penumbra" approach to reading in peripheral rights into Article 19. Although his opinion in Maneka Gandhi's case advanced a broad conception of personal liberty, J. Bhagwati was careful to note that the right to travel abroad was rooted in Article 21's provision for personal liberty and not through a structural reading of Article 19.

The Court's decision in *Maneka Gandhi v. Union of India* was a groundbreaking one in that it reversed the restricted view of the Gopalan's majority of the terms "personal liberty" and "procedure established by law" in Article 21, in holding that the right to travel was part of the broad ambit of liberty, and that regulations restricting that right were subject to judicial scrutiny and invalidation where those regulations were held to be arbitrary and unreasonable. The court overturned and invalidated regulations under the Passport Act of 1967, on the grounds that the seizure of petitioner's passport was arbitrary and unreasonable and infringed on her fundamental right of travel. Maneka Gandhi's case thus incorporated substantive due process into Article 21.

Impact of Maneka Gandhi Case

1. Art. 21 which had been dormant for nearly three decades has been brought to life by this case. Art. 21 has now assumed a "highly activist magnitude." Justice V. R. Krishna Iyer has characterized Art. 21 as "Procedural Magna Carta protective of life and liberty."

[1]357 U.S. 116 (1958).
[2] 378 U.S. 500 (1964).
[3] 381 U.S. 1 (1965).

2. The case has also deeply influenced the administration of criminal justice and prison administration.

3. Art. 21 has proved to be a very productive source of several fundamental rights over and above those mentioned in Arts. 14 to 31.

4. A significant dimension of this case is the impact it is having on the development of administrative law.

Later Cases Recognizing Due Process within Indian Constitution

Two decisions announced by the Supreme Court of India in May 2010 strikingly indicated that the American doctrine of "due process" has firmly become a part of Indian constitutional law, despite the Constitution-framers' contrary intentions. In the first of the two cases, decided on May 5, *Selvi v. State of Karnataka*[1], the court considered the constitutionality of the investigative narco-analysis technique, holding it permissible only when the subject consents to its use. In the narco-analysis case Chief Justice K.G. Balakrishnan[2] held that "substantive due process" is now a "guarantee" under the Constitution. This declaration is a remarkable rejection of the framers' decision to delete the due process clause. In its narco-analysis opinion, the court upheld a right to mental privacy, recognizing an "unremunerated" right as recognized by American courts exercise of the Due Process Clause. The right to privacy has been around in Indian constitutional law for decades, and the court's opinion in Selvi case merely adds to the existing body of law on constitutional privacy.

In the second case, decided on May 11, *Union of India v. R. Gandhi*[3], a Constitution Bench unanimously held that certain provisions of the law regarding the appointment and qualifications of the members of the National Company Law Tribunal, suffered from unconstitutional defects. However, the Indian Constitution does not strictly or textually permit courts to strike down a piece of legislation merely because its provisions are "unfair" or "arbitrary," in the absence of a violation of one of its enumerated provisions. To overcome this difficulty, the court in this case

[1] (2010) 7 SCC 263.
[2] Konakuppakatil Gopinathan Balakrishnan was 37th Chief Justice of India.
[3] (2010) 11 SCC 1.

held that principles such as "independence of the judiciary" are part of the "essence" of the right to equality, and consequently must be enforced. Formerly, principles such as "independence of the judiciary," "rule of law" and "separation of powers" would usually be applied using the basic structure theory only to constitutional amendments. In its R. Gandhi opinion, the court has remarkably applied loose constitutional principles rooted in its understanding of "fairness" or constitutional "basic structure" to ordinary law.

Likewise in the case of *SidharthaVashisht v. State (NCT of Delhi)*[1]the Supreme Court held that due process shall deem to include fairness in trial. It places implied obligation upon prosecution to make fair disclosure of all documents. Those documents would take in its ambit furnishing document to accused which prosecution relies upon whether filed in court or not. In this case one report of ballistic expert was not furnished to the accused.

In another case of *State of M. P. v. SheetlaSahai&Ors.*[2]The Supreme Court held that right of accused to have a fair investigation, fair enquiry and fair trial is enshrined under Art. 21 of the Constitution of India and it is covered under due process and the prosecution cannot at any stage deprive the accused of taking advantage of the materials which the prosecution itself has placed on record.

Conclusion

However, despite the express textual choices of the framers of India's Constitution, the "due process" clause found a backdoor entry into Indian constitutional analysis in the late 1970s through the right to equality, which has ever since become a conduit for activist constitutional interpretation. In Justice P.N. Bhagwati's classic opinion in the Maneka Gandhi case, it was held that the Constitution mandates "fair" procedure when rights are deprived. Although the court would repeatedly hold in subsequent cases that the American standard of "due process" did not apply to the Indian Constitution, in reality the court would apply nothing less than due process standards to administrative and legislative authorities in its emphasis on "fair, just and reasonable" procedure. The court through due process has invoked many rights which are not

[1] (2010) 6 SCC 1.
[2] (2009) 8 SCC 617.

expressly mentioned in Art. 21 of the Indian Constitution. Thus this due process clause has benefitted peoples of India against arbitrary actions of the state because due process requires that the procedure which takes away any person's right of life or property or liberty must not be unfair or unjust or unreasonable. This judicial activism of due process started in 1970s in India and it is being continued today by the Supreme Court of India. Whenever any case comes before the Supreme Court in which violation of life or liberty or property of any individual is in question the court takes it very actively and ensures whether the procedure by which the individual has been deprived of his life or liberty or property is fair, just and reasonable or not and if the procedure is not so then it declares the procedure to be unconstitutional. So as the judiciary has interpreted and is interpreting Art 21, it can be said that due process has been an integral part of the Constitution of India and it secures the deprivation of life, liberty and property of an individual by a procedure which is unfair or unjust or unreasonable.

LEGAL FRAMEWORK OF LIMITED LIABILITY PARTNERSHIP IN INDIA[1]

Introduction

With the growth of the Indian economy, the role played by its entrepreneurs as well as its technical and professional manpower has been acknowledged internationally. It is felt opportune that entrepreneurship, knowledge and risk capital combine to provide a further impetus to India's economic growth. In this background, the need has been felt for a new corporate form that would provide an alternative to the traditional partnership, with unlimited personal liability on one hand, and statute based governance structure of the limited liability company on the other, in order to enable professional expertise and entrepreneurial initiative to combine, organize and operate in flexible, innovative and efficient manner.[2]

The existence of Limited Liability Partnership (LLP) which has its genesis in general partnership is now a reality in India with the enactment of the Limited Liability Partnership Act, 2008, (LLP Act) from March 31, 2009.[3]

It was felt that the Companies Act, 1956 (Companies Act) is not suited to the liability and governance structure intended for LLPs. The overall intent of the legislation to regulate widely-held companies is different. Therefore, in accordance with the recommendations of the Irani Committee, it was felt appropriate to bring a new legislation for LLPs. The administration and enforcement of partnership firms under the Indian Partnership Act, 1932 (Partnership Act) is at the State level. Besides, a partnership firm involves full joint and several liabilities of the partners.[4] Because of this, many enterprises engaged in biotech, information technology, etc find traditional

[1]Pooja, Research Scholar, BPS Women University.
[2]The statement of Objects and Reasons appended to the Limited Liability Partnership Bill 2006, introduced in the Rajya Sabha on 15th December by Mr. Prem Chandra Gupta, the Minister of Company Affairs,[2] explains the object of this new device of organization. (Unpublished manuscript, on file with author).
[3]Sanjiv Agarwal, "Genesis and concept of Limited Liability Partnership" 23*CCD* ,178
[4]Pollock &Mulla, The Indian Partnership Act, p. 439

partnerships unsuitable. Also, the traditional partnership firms are very unsuitable for multi-disciplinary combinations like the combination of lawyers and accountants, which is the hot combination today. Thus, the LLP Act is intended to remove the gulf which exists between a company governed by the Companies Act and a general partnership firm governed by the Partnership Act.[1]

Need for Limited Liability Partnership

At present, under partnership law, the maximum numbers of partners a partnership firm can have is twenty also the partners are liable jointly and severally and most importantly their liability is unlimited which means that the personal property of the partners can also be attached for the satisfaction of the debts, in addition to the capital contributed by the partners in the firm.

This is the principal reason why partnerships firms of professionals have not grown in size to meet the challenges posed today. Not only are the firm's assets completely liquidated under the standard principles of the partnership law, but the partners are also jointly and severally liable for the entire liabilities of the partnership. Thus, the present system acts as a deterrent for the growth and expansion of service based organizations.

With the growth of the Indian economy, the role played by its entrepreneurs as well as its technical and professional manpower has been acknowledged internationally. It is felt opportune that entrepreneurship, knowledge and risk capital combine to provide a further impetus to India's economic growth. In this background, a need has been felt for a new corporate form that would provide an alternative to the traditional partnership, with unlimited personal liability on the one hand, and, the statute-based governance structure of the limited liability company on the other, in order to enable professional expertise and entrepreneurial initiative to combine, organize and operate in flexible, innovative and efficient manner.

[1]KartikeyMahajan, Limited Liability Partnership Act: a long way forward, International 6 *CC Law* Review206 (2009).

The Limited Liability Partnership (LLP) is viewed as an alternative corporate business vehicle that provides the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on a mutually arrived agreement. The LLP form would enable entrepreneurs, professionals and enterprises providing services of any kind or engaged in scientific and technical disciplines, to form commercially efficient vehicles suited to their requirements. Owing to flexibility in its structure and operation, the LLP would also be a suitable vehicle for small enterprises and for investment by venture capital. Keeping in mind the need of the day, the Parliament enacted the Limited Liability Partnership Act, 2008 which received the assent of the President on 7th January, 2009.[1]

Limited liability concept was introduced in order to adopt a corporate form, which combines the organizational flexibility and tax status of partnership with the advantage of limited liability for its partners. Limited liability partnership (LLP) is a body corporate formed and incorporated under the Limited Liability Partnership Bill, 2006, which is a distinct legal entity separate from its partners. It has perpetual succession. In India, businesses mainly operate as companies, sole proprietorships and partnerships. Each of these is subject to different regulatory and tax regimes reflecting their organization and ownership. LLP, as a new business structure, would fill the gap between business firms such as sole proprietorship and partnership, which are generally unregulated and limited liability companies, which are governed by the Companies Act, 1956. In addition to an alternative business structure, LLP would foster the growth of the services sector and will provide a platform to small and medium enterprises and professional firms of company secretaries, chartered accountants, advocate to conduct their business/profession efficiently which would in turn increase their global competitiveness. In view of the increasing role of the service sector in the Indian

[1]*Available at* http://www.lexvidhi.com/article-details/need-of-llp-s-and-salient-features-of-llp-act-2008-349.html. (last visited on July 29, 2016).

economy, a need has been recognized for a new corporate entity, that is, LLP that will combine the characteristics of corporate and non-corporate.[1]

The Companies Act is not suited to the liability and governance structure intended for LLPs. The overall intent of the legislation to regulate widely held companies is different. Therefore, in accordance with recommendations of the Irani Committee, it is felt appropriate to bring about a separate legislation for LLPs. The administration and enforcement of partnership firm under the Indian Partnership Act 1932 is at the State level. Besides, a partnership firm involves full joint and several liability of the partners. Because of this, many firms/enterprises engaged in biotech, information technology, Intellectual property and other knowledge based sectors conclude traditional partnership unsuitable the traditional partnership are also considered unsuitable for multi-disciplinary combinations comprising a large number of partners, seeking flexible working environment but with limited liability.LLP structure would promote growth and enable such firms /enterprises expand their trade /business or services across States in India and also abroad.

Legal Framework of Limited Liability Partnership in India

The Indian Legislature, keeping in view, the international business trends where a range of services is being offered by professionals and businesses in the form of Limited Liability Partnerships, has enacted the much awaited Limited Liability Partnership Act. The Limited Liability Partnership Bill, 2006, was approved by the Cabinet on Dec 7, 2006 and was introduced in the RajyaSabha on 15th Dec, 2006. It was later referred to the Department Related Parliamentary Standing Committee on Finance for examination. The Committee submitted its report to both Houses of Parliament on 27th Nov, 2007, recommending some changes along with some suggestions regarding the LLP Bill, 2006.[2] On 12th Dec 2008, the Parliament passed the Limited Liability Partnership Bill, 2008. The Limited Liability Partnership Bill, 2008 received the assent of the Hon'ble

[1]Ministry of Companies Affairs (2006), Limited Liability Partnership Bill 2006

President on 7th January, 2009 and has now become a legislation to be called as 'Limited Liability Partnership Act, 2008'.

- ***Limited Liability Partnership Bill 2006:***

The LLP Bill, 2006 is broadly based on the UK and Singapore LLP Acts. The Central Government has retained the power to make rules for carrying out the provisions of the Act. The LLP Bill does not have provisions related to taxation of LLP, which are expected to be addressed in the Income-Tax Act like all other business entities. The Bill is divided into XIV Chapters having 73 Sections and Four Schedules. **The following are the main provision of the Bill:-**

a) The LLP shall be a body corporate and a legal entity separate from its partners. Any two or more persons, associated for carrying on a lawful business with a view to profit, may by subscribing their names to an incorporation document and filing the same with the Registrar, form a LLP. The LLP will have perpetual succession.
b) The mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement between partners or between the LLP and the partners subject to the provisions of the proposed legislation. The Bill provides flexibility to devise the agreement as per their choice. In the absence of any such agreement, the provisions of law shall govern the mutual rights and duties.
c) The LLP will be a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP, which may be of tangible or intangible nature or both tangible and intangible in nature. No partner would be liable on account of the independent or un-authorized actions of other partners or their misconduct.
d) Every LLP shall have at least two partners and shall have at least two individuals as Designated Partners, of whom at least one shall be resident in India. The duties and obligations of Designated Partners shall be as provided in the law.
e) The LLP shall be under an obligation to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency shall be filed by

every LLP with the Registrar every year. The accounts of LLPs shall also be audited, subject to any class of LLPs being exempted from this requirement by the Central Government.

f) The Central Government shall have powers to investigate the affairs of an LLP, if required, by appointment of competent inspector for the purpose.

g) The law would confer powers on the Central Government to apply such provisions of the Companies Act, 1956 to provide, inter-alia, for mergers, amalgamations, winding up and dissolutions of LLPs, as appropriate, by notification with such changes or modifications as deemed necessary. However, such notifications shall be laid in draft before each House of Parliament for a total period of 30 days and shall be subject to any modification as may be approved by both Houses.

h) The Indian Partnership Act, 1932 shall not be applicable to LLPs. Other entities may convert themselves to LLP in accordance with provisions of law.

i) The Central Government shall have powers to make rules for carrying out the provisions of the proposed legislation.[1]

Comments and suggestions received from different quarters were examined and Limited Liability Partnership Bill, 2006 was drafted.[2] Various stages behind the drafting of the Limited Liability Partnership Bill, 2006.Two high level expert committees

- Naresh Chandra Committee II and
- Dr. J.J. Irani Committee

On New Company Law were set up by the Ministry of Corporate Affairs who recommended a separate LLP Legislation for the country. A concept paper on LLP law was prepared by a technical group comprising representatives of ICAI/ICSI/ICWAI working with the Ministry officials, and placed on the website in November 2005

[1]. Ministry of Finance and Company Affairs (2003), "Naresh Chandra Committee-Second Report on Regulation of Private Companies and Partnerships", Academic Foundation, Economica India, 2004, Page 87-96.
[2]Limited Liability Partnership Law, Company Affairs, Oct. 15, 2009, *available atpib.nic.in/.../comp_affairs_2years_upa_gov_may2006.asp* (last visited on July 25, 2016).

seeking public comments. The concept paper was also circulated to a large number of other departments and ministries and received good response and comments which were then internally examined by the ministry. Corresponding legislations of other countries like the United Kingdom, United States of America and Singapore were consulted during examination. Taking the feedback received into consideration, a draft LLP Bill was prepared based on the concept paper. A draft Cabinet Note was circulated to the concerned Ministries/Departments.

- *Processes followed in drafting the Bill in India:*

Various stages behind the drafting of the Limited Liability Partnership Bill,2006:

a) Two high level expert committees (i) Naresh Chandra Committee II and (ii) Dr. J.J. Irani Committee on New Company Law were set up by the Ministry of Corporate Affairs who recommended a separate LLP Legislation for the country;
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c) The concept paper was also circulated to a large number of other departments and ministries and received good response and comments which were then internally examined by the ministry;
d) Corresponding legislations of other countries like the United Kingdom, United States of America and Singapore were consulted during examination;
e) Taking the feedback received into consideration, a draft LLP Bill was prepared based on the concept paper. A draft Cabinet Note was circulated to the concerned Ministries/Departments;
f) Vetting by the Legislative Department was finally carried out, before it was laid before the Parliament.

- ***Parliamentary Standing Committee Report, 2007***

The Bill after being approved by the Cabinet on December 7, 2006, was introduced in the RajyaSabha on December 15, 2006. It was later referred to the Department Related Parliamentary Standing Committee on Finance for examination and report. The Committee submitted its report to both Houses of Parliament on November 27, 2007, recommending some changes along with some suggestions.

- ***Limited Liability Partnership Bill, 2008***

Thereafter, the Limited Liability Partnership Bill, 2008 was drafted and introduced in the RajyaSabha. The Bill incorporated the views the recommendations made by the Standing Committee and other relevant inputs. Minister of Corporate Affairs, presented the Bill for consideration and passage by the House. All members supported it, thereby giving it the nod of the RajyaSabha.[1] Thereafter Bill was introduced in the LokSabha and same was passed by the House on 11 December, 2009.

- ***Limited Liability Partnership Act 2008***

The LLP Bill received the assent of the President of India on January 7, 2009 and it became the LLP Act, 2008. The Government of India vide Notification S.O. 891(E), in the Official Gazette of India, has appointed the 31st Day of March, 2009 as the date on which the various sec of LLP Act would become applicable.[2]Comprises 81 sections contained in 13 chapters. Further the following 4 schedules have been provided at the end of the Act. The first schedule is a model set of terms of LLP agreement. The second schedule contains provisions for conversion of a firm into LLP. The third schedule contains provisions for conversion of a private limited company into LLP. The fourth schedule contains provisions for conversion of an unlisted public limited company into LLP. The Ministry of Corporate Affairs and Registrar of Companies have been entrusted with the task of administration of the Act and Rules framed there under. **Salient features of LLP Act, 2008 is given below:-**

[2]Limited Liability Partnership An alternative Corporate Business Vehicle, *available at:* http://patanjaliassociates.com/uploaded_files/news/1250663590.pdf (last visited on August 29, 2016)

a) The LLP shall be a body corporate and a legal entity separate from its partners. Any two or more persons, associated for carrying on a lawful business with a view to profit, may by subscribing their names to an incorporation document and filing the same with the Registrar, form a Limited Liability Partnership. The LLP will have perpetual succession;

b) The mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement between partners or between the LLP and the partners subject to the provisions of the LLP Act 2008. The act provides flexibility to devise the agreement as per their choice. In the absence of any such agreement, the mutual rights and duties shall be governed by the provisions of proposed the LLP Act

c) The LLP will be a separate legal entity, liable to the full extent of its assets, with the liability of the partners being limited to their agreed contribution in the LLP which may be of tangible or intangible nature or both tangible and intangible in nature. No partner would be liable on account of the independent or un-authorized actions of other partners or their misconduct. The liabilities of the LLP and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the LLP;

d) Every LLP shall have at least two partners and shall also have at least two individuals as Designated Partners, of whom at least one shall be resident in India. The duties and obligations of Designated Partners shall be as provided in the law;

e) The LLP shall be under an obligation to maintain annual accounts reflecting true and fair view of its state of affairs. A statement of accounts and solvency shall be filed by every LLP with the Registrar every year. The accounts of LLPs shall also be audited, subject to any class of LLPs being exempted from this requirement by the Central Government;

f) The Central Government have powers to investigate the affairs of an LLP, if required, by appointment of competent Inspector for the purpose;

g) The compromise or arrangement including merger and amalgamation of LLPs shall be in accordance with the provisions of the LLP Act 2008;

h) A firm, private company or an unlisted public company is allowed to be converted into LLP in accordance with the provisions of the Act. Upon such conversion, on and from the date of certificate of registration issued by the Registrar in this regard, the effects of the conversion shall be such as are specified in the LLP Act. On and from the date of registration specified in the certificate of registration, all tangible (moveable or immoveable) and intangible property vested in the firm or the company, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, and the whole of the undertaking of the firm or the company, shall be transferred to and shall vest in the LLP without further assurance, act or deed and the firm or the company, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies, as the case may be;

i) The winding up of the LLP may be either voluntary or by the Tribunal to be established under the Companies Act, 1956. Till the Tribunal is established, the power in this regard has been given to the High Court;

j) The LLP Act 2008 confers powers on the Central Government to apply provisions of the Companies Act, 1956 as appropriate, by notification with such changes or modifications as deemed necessary. However, such notifications shall be laid in draft before each House of Parliament for a total period of 30 days and shall be subject to any modification as may be approved by both Houses;

k) The Indian Partnership Act, 1932 shall not be applicable to LLPs[1]

l) The LLP has an alternative corporate business vehicle that would give the benefits of limited liability but allows its members the flexibility of organizing their internal structure as a partnership based on an agreement[2]

m) LLP does not restrict the benefit of LLP structure to certain classes of professionals only and would be available for use by any enterprise whichfulfils the requirements of the Act[3].

[1]*Available at*: http://www.lexvidhi.com/article-details/need-of-llp-s-and-salient-features-of-llp-act-2008-349.html (last visited on July 29, 2016).
[2]J. Krishnamurthy, "LLP Act 2008-X-Rayed",29*csjcpr* 1369(2009)
[3]D.K Prahlad Rao, "limited liability partnership Act 2008 An overview", 39 *CSjcp,*1369(2009).

n) While the LLP has a separate legal entity, enable to the full extent of its assets, the liability of the partners would be limited to their agreed contribution in the LLP. Further, no partner would be liable on account of the independent or unauthorized actions of other partners, thus allowing individual partners to be shield from joint liability created by another partner's wrongful business decision or misconduct[1]

o) An LLP shall be under a obligation to maintain annual accounts reflecting true and fair view of its state of affairs. Since tax matter of all entities in India are address in the Income Tax Act 1961 the tax of LLP also address in the Act[2].

p) While enabling provisions in respect of winding up and dissolution of LLPs have been made detailed provisions in this regard would be provide by way of rules under the Act. The winding up of LLP may be either voluntary or by the Tribunal to be established under the Companies Act, 1956. Till the tribunal is established, the power in this regards has been given to the high court.[3]

q) The Act also provides for conversion of existing partnership firm, private limited company and unlisted public company into a LLP by registering the same with the Registrar of Companies (ROC).[4]

- ***Limited Liability Partnership Rules 2009***

In exercise of the powers conferred by sub-secs (1) and (2) of sec 79 of the LLP Act, Central Government has enacted the Limited Liability Partnership Rules 2009. Rules 1 to 31, rules 34 to 37 and rule 41 of these rules has come into force on the 1st day of April, 2009. Rules 32 and 33 and rules 38 to 40 of these rules shall come into force on such date as the Central Government may, by notification in the Official Gazette, appoint.[5]

[1]T.N Pandey, "limited liability partnerships – too much corporatism frustrates the objective of new form of business organization", 39*CSjcp*1369 (2009).
[2]Shri Prem Chand Gupta,Parliament passes Limited liability partnership(LLP) Bill 2008, dec12,2008, *available at* : http:// www. icwai.org/icwai/docs/LLP-2008.pdf_ Bill 2008, last visited on September 29, 2016).
[3]Rajkumar S. Adukia, "overview of provisions relating to limited Liability partnership", 39 *csjcp,*1369.
[4]J.Krishnamurthy, "LLP Act 2008- X-Rayed", 39*CSjcp,*1369-1540, (2009)
[5]Notification no. G.S.R. 229 (E) dated 1 April 2009, *available at:* http://www. llp. gov. in/ notifycation .htm (last visited on July 29, 2016).

LLP Act, 2008 –An Overview

An LLP under the Limited Liability Partnership Act, 2008 is a body corporate having a distinct legal entity separate from that of its partners and has perpetual succession i.e. any change in the partners will not affect the existence, rights or liabilities of the LLP.

The Limited Liability Partnership shall be required to have at least two partners but there will be no limit on the maximum number of partners. If at any time the number of partners of an LLP is reduced below two and such LLP carries on business for more than six months, the person who is the only partner of the LLP during the time it carries on business after those six months shall be liable personally for the obligations of the LLP incurred during that period.[1]Any individual or body corporate may be a partner in an LLP.[2] Further, the provisions of the Indian Partnership Act, 1932 shall not be applicable to an LLP.[3]Further, an LLP, will by its name has the power to sue and being sued, hold and dispose property, have a common seal and to do and suffer such other acts as bodies corporate may lawfully do and suffer. Every LLP is required to have either the words limited liability partnership or the acronym LLP as the last words of its name

- ***Key Definitions***

a) "Body Corporate" is defined to mean a company as defined under the Companies Act, 1956 and includes LLP, LLP incorporated outside India, a foreign company but does not include a corporation sole, a registered co-operative society and any other body corporate notified by the Central Government (not being a company defined under the Companies Act, 1956 or LLP defined under LLP Act).[4]

b) "Business" includes every trade, profession, service and occupation.[5]

[1]Limited Liability Partnership Act,2008,s6(2).
[2]Limited Liability Partnership Act,2008,s (5).
[3]Limited Liability Partnership Act,2008,s 4
[4]Limited Liability Partnership Act,2008,s 2(1)(d)
[5]Limited Liability Partnership Act,2008,s 2(1) (e)

c) "Financial Year", in relation to LLP, means the period from 1st April of a year to the 31st March of the following year. However, in case of LLP incorporated after 30th September, financial year may end on 31st March of the year next following that year. [1]

d) "Foreign Limited Liability Partnership" means a LLP formed, incorporated or registered outside India which establishes a place of business within India? [2]

e) "Limited Liability Partnership" means a partnership formed and registered under LLP Act.[3]

f) "Limited liability partnership agreement" means any written agreement between the partners of LLP or between the LLP and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that LLP.[4]

g) "Partner" in relation to LLP means a person who becomes a partner in a LLP in accordance with the LLP agreement.[5]

- ***Nature of LLP***

a) "body corporate" formed and incorporated under LLP Act;

b) Legal entity separate from its partners and has perpetual succession[6]

- ***Designated Partners[7]***

LLP shall have at least two "designated partners" who are individuals and at least one of them shall be "resident in India". In case one or more of the partners of a LLP are bodies corporate at least two individuals who are partners of such LLP or nominees of such bodies corporate shall act as "designated partners"

"Resident in India" means a person who has stayed in India for minimum 182 days during the immediately preceding 1 year.

[1]Limited Liability Partnership Act,2008,s 2(1) (l)
[2]Limited Liability Partnership Act,2008,s 2(1) (m)
[3]Limited Liability Partnership Act,2008,s 2(1)(n)
[4]Limited Liability Partnership Act,2008,s 2(1) (o)
[5]Limited Liability Partnership Act,2008,s 2(1)(q)
[6]Limited Liability Partnership Act,2008,s 3(1)
[7]Limited Liability Partnership Act,2008,s 7

Designated partner is responsible for compliance with the provisions of LLP Act. Designated Partner is required to obtain Designated Partner Identification Number [DPIN] from the Central Government. Application for allotment of DPIN needs to be submitted online on the LLP website along with the necessary proof duly attested and certified as prescribed.

- ***Incorporation of LLP[1]***

Procedure for incorporation of LLP is similar to the procedure for incorporation of a company under the Companies Act, 1956. Applicants are first required to file the application for reservation of name with the Registrar of Companies [ROC]. Once the name applied is approved by the ROC, the documents for incorporation of LLP need to be filed. Name of every LLP shall end with the words "Limited Liability Partnership" or "LLP". Name which is undesirable or nearly resembles to that of any other partnership firm or LLP or anybody corporate or trade mark is not allowed. Any entity (body corporate/registered partnership firm) which has a name similar to the name of LLP which has been incorporated subsequently may seek change of name of such LLP through ROC within 24 months from date of registration of such LLP No person shall carry on business under any name/title which contains the words "Limited Liability Partnership" or "LLP" without duly incorporating it as LLP under the LLP Act. LLP is required to file with the ROC, the LLP agreement ratified by all the partners within 30 days of incorporation of LLP.

- ***Partners and their relations and extent of liability[2]***

Mutual rights and duties of partners of an LLP inter se and those of the LLP and its partners shall be governed by an agreement between the partners, or agreement between the LLP and its partners. In absence of any such agreements, the mutual rights and duties shall be governed by the LLP Act. Every partner of a LLP is, for the purpose of the business of LLP, the agent of LLP, but not of other partners. LLP, being a separate legal entity, shall be liable

[1]Limited Liability Partnership Act,2008,s 11 to 21
[2]Limited Liability Partnership Act,2008,s 22 to 31

to the full extent of its assets whereas the liability of the partners of LLP shall be limited to their agreed contribution in the LLP

LLP is not bound by anything done by a partner in dealing with a person if

a) the partner in fact has no authority to act for the LLP in doing a particular act;and
b) the person knows that he has no authority or does not know or believe him to be a partner of the LLP
c) LLP is liable if the partner of a LLP is liable to any person for wrongful act/omission on his part in the course of business of LLP/with its authority
d) Obligation of LLP whether arising in contract or otherwise, shall solely be the obligation of LLP. Liabilities of LLP shall be met out of properties of LLP

Partner is not personally liable for the obligations of LLP solely by reason of being a partner of LLP. No partner is liable for the wrongful act or omission of any other partner of LLP, but the partner will be personally liable for his own wrongful act or omission. The liability of the LLP and partners who are found to have acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the LLP.

- ***Contribution by partner***[1]

A contribution of a partner to the capital of LLP may consist of any of the

a) tangible, movable or immovable property
b) intangible property
c) Other benefit to the LLP including money, promissory notes, contracts for services performed or to be performed.

The obligation of a partner for the contribution shall be as per the LLP agreement. Creditor, which extends credit or acts in reliance on an obligation described in the LLP

[1]Limited Liability Partnership Act,2008,s 32 and 33

agreement, without the notice of any compromise made between the partners, may enforce the original obligation against such partner.

- ***Audit/financial disclosures***[1]

LLP shall maintain the prescribed books of accounts relating to its affairs on cash or accrual basis and according to the double entry system of accounting. The accounts of every LLP are required to be audited, except in following situations:

a) Turnover does not exceed Rs. 40,00,000 in any financial year; or
b) Contribution does not exceed Rs. 25, 00,000
c) Central Government has powers to exempt certain class of LLP from requirement of compulsory audit. LLP are required to file following documents with the ROC
d) Statement of Account and Solvency, within 30 days from the end of 6 months of the financial year;
e) Annual return within 60 days from the end of the financial year.

- ***Assignment & transfer of partnership rights***[2]

The rights of a partner to a share of the profits and losses of the LLP and to receive distribution in accordance with the LLP agreement are transferable, either wholly or in part. However, such transfer of rights does not cause either disassociation of the partner or a dissolution and winding up of the LLP. Such transfer of right, shall not, by itself entitle, the assignee or the transferee to participate in the management or conduct of the activities of the LLP or access information concerning the transactions of the LLP

- ***Foreign LLP***[3]

[1]Limited Liability Partnership Act,2008,s 34 and 35
[2]Limited Liability Partnership Act,2008,s 42
[3]Limited Liability Partnership Act,2008,s 59 and Rule 34

On establishment of a place of business in India, foreign LLP are required to file prescribed documents for registration with ROC within 30 days of the establishment in India. Any alteration in the constitution documents, overseas principle office address and partner of foreign LLP are required to be filed with the ROC in the prescribed form within 60 days of the close of the financial year. Any alteration in the certificate of registration of foreign LLP, authorized representative in India and principle place of business in India are required to be filed with the ROC in the prescribed form within 30 days of alteration. Foreign LLP ceasing to have a place of business in India, are required to give notice to ROC in the prescribed form within 30 days of its intention to close the place of business and from the date of such notice, the obligation of Foreign LLP to file any document with the ROC shall cease, provided it has no other place of business in India and it has filed all the documents due for filing as on the date of the notice. Conversion of partnership firm/private company/unlisted public company into LLP [Sections 55 to 58, Second, Third and Fourth Schedules.

- ***Miscellaneous provisions***
  a) The Central government has been empowered to apply any of the provisions of the Companies Act, 1956 to LLPs with suitable changes or modification.[1]
  b) ROC may strike off the name of LLP from the register of LLP if LLP is not carrying on business or its operation, in accordance with the provisions of LLP Act in the manner prescribed.[2]
  c) Forms/documents required to be filed under the LLP shall be filed in electronic form online on the LLP portal duly authenticated by the partner/designated partner with a digital signature and further attested by the practicing chartered accountant/company secretary/cost accountant whenever required.[3]
  d) Presently all the provisions of the LLP Act, other than those relating to winding up and dissolution of LLP and appellate provisions to be exercised by NCLT

[1]Limited Liability Partnership Act,2008,s 67
[2]Limited Liability Partnership Act,2008,s 75
[3]Limited Liability Partnership Act,2008,s 68

and National Company Law Appellate Tribunal [NCLAT], have been brought into force.

e) Till the constitution of NCLT and NCLAT under the Companies Act, 1956, the powers of NCLT and NCLAT will be exercised by the Company Law Board or High Court as is specified in the LLP Act.[1]

f) Unless specifically provided, the provisions of the Indian Partnership Act, 1932 are not applicable to LLPs.[2]

Judicial Interpretation of Limited Liability Partnerships

An overview of some of the decisions rendered by the English courts on the nature of an LLP may be useful to be examined. This is for two reasons: a) the Indian LLP Act, 2008 draws heavily upon the English LLP Act, 2000; and, b) traditionally, the Indian judges have relied on the wisdom of their English counterparts.

At the outset, it may be useful to visit the general rules for imposing liability for the tort of negligence may be expedient to fully appreciate their (non)-extension to LLPs by the English court. The principle for imposing the liability for negligence under the English law is the principle of assumption of responsibility. Although in principle the courts there have laid down a three-prong test of reasonably foreseeable loss, proximity of defendant‘s act with the injury suffered and a general enquiry into whether it is just, fair and reasonable to impose a duty of care, the courts have been lately using the assumption of responsibility justification[3] at least after the House of Lords decision in *Hedley v. Heller.*[4] This seems like a sufficient test.[5]The liability in tort may exist in addition to the liability under contract.[6]

[1]Limited Liability Partnership Act,2008,s 81
[2]Limited Liability Partnership Act,2008,s 4
[3]Barker, Unreliable Assumptions in the Modern Law of Negligence‘(1993) 109 LQR 461; and, Hepple, The Search for Coherence‘(1997) 50 *Current Legal Problems* 67 at 88.
[4]*Hedley Byrne & Co Ltd v Heller & Partners Ltd* [1964] AC 465.
[5]See, *Henderson v Merrett Syndicates Ltd* [1995] 2 AC 145.
[6]*Ibid*

We would now consider how the liability of the firm and partners for negligence of a co-partner has undergone substantial change after the enactment of LLP Act, 2000 in the UK.[1].

Case: - Dubai Aluminum Co Ltd v Salaam and Others[2]

In that case, one of the partners of a law firm (*not an LLP)* drew up agreements that were used for a fraud of sham contracts. The other two partners of the firm were personally innocent of any wrongdoing. In answering a claim by the defrauded plaintiff, the co-partners of the defrauding partner paid up part of the compensation to the plaintiff. During the contribution proceedings, the co-partners sought to recover the compensation paid by them. The House of Lords disallowed the relief to the co-partners.

The *Dubai Aluminum* case demonstrates the extent of liability of a general partnership and that of its partners for the acts done by other partners. It was reiterated in this case by the House of Lords that acts, though not authorized by his co-partners, could nevertheless be said to be done "in the ordinary course of the business of the firm" if, for the purpose of the firm's liability to third parties, it could fairly and properly be regarded as done by the partner while acting in the ordinary course of the firm's business; such that such acts would be capable of attracting personal liability for the other partners also and vicarious liability for the firm.

Case: - Re, Rogers [3]

In this case, a testatrix executed a will under which she appointed the *partners* in the *firm* of [a named law firm]‖ as its executors and trustees. Subsequently, this named law

[1]See generally, Young, Limited Liability Partnerships A Chance for Peace of Mind (2000) *Business Law Review* 257; See also, for the differences and similarities between the liabilities of Company Directors and LLP-Partners, Morse, Partnerships for the 21st Century?: Limited Liability Partnership and Partnership Law Reform in the UK [2003] *Singapore Journal of Legal Studies* 455; Freedman, Limited Liability Partnerships in the UK Do they have a role for Small Firms? 26 *Journal of Corporation Law* 897.
[2]2002 UKHL 48
[3]2006 EWHC 753 (Ch)

firm merged with another law firm. The merged entity was constituted and incorporated as an LLP. All the partners of the merged firm became ―members‖ of the LLP. The question before the court therefore was whether this change in the legal status into an LLP and its members, was sufficient to render the words of the will incapable of being carried out.

Case: - In the Matter of Magi Capital Partners LLP[1]

The case stands for the proposition that in matters of dissolution, an LLP is more akin to a company than a partnership since this involves the winding up of a separate legal entity, incorporated under a statute.

Committees and recommendations for legislation on LLPs in India

The need for LLP legislation has been recognized for a very long time. Various committees and expert groups have, from time to time, recommended introduction of LLP legislation in India. In the last decade itself, AbidHussain Committee (1997) had recommended this legislation in the context of SSIs. The Naresh Chandra Committee on Regulation of Private Companies and Partnerships (2003) and Dr.Irani Committee on New Company Law (2005) had also made recommendations for a separate LLP Legislation.[2]

- ***Law Commission Report on Partnership Act, 1932***

In the year 1957, Law Commission decided to take up revision of the Partnership Act 1932 and thereby entrusted the task to a sub-committee consisting of Shri G S Pathak and Shri G N Joshi. The Committee thereafter prepared a draft report which was circulated to all members of the public and views were invited thereon. In this regard it was suggested that partnerships with limited liability should be recognized in India

[1] 2003 EWHC 2790 (Ch)

either by a special enactment or as part of the Partnership Act.[1] A concrete suggestion made by the Iron, Steel and Hardware Merchant Chambers of India in this respect may be noted:

"Considering the recent amendment in the Indian Companies Act, we feel that a provision should be made in the Indian Partnership Act 1932 by which limited liability partnerships can be entered into on the lines of the Limited Partnership Act. The Indian Companies Act has become o cumbersome that for a small business it is impossible to comply with all the provisions unless a full time Secretary is engaged. Before the amendment was introduced in the Indian Companies Act, two or three partners used to find it convenient to register a Private Limited Company and carry on the work. Now there are so many restrictions on taking loan by the directors or the shareholder even in private limited companies that people will prefer to enter into a partnership instead of forming a limited liability company. That risk can only be minimized by introducing limited liability partnership."

The Commission carefully considering this suggestion Commission came to the conclusion that having regard to the conditions prevailing in India, the inherent shortcomings of limited liability partnerships, And the fact that even in England, notwithstanding legislation permitting such partnerships, not many such partnerships have been actually formed, it is neither necessary nor expedient to make provision for limited liability partnerships in India. The suggestion if accepted, is also likely to result in rendering ineffective the provisions of the Companies Act which has been recently made stricter.[2]

- ***Recommendations of the Bhat Committee (1972)***

The Bhat Committee (1972) had recommended limited liability for Small Scale Industrial entrepreneurs so that more persons could be persuaded to invest in new small

[2] 7th Law Commission Report on Partnership, *available at* www.lawcommissionofindia.com (last visited on January 23, 2017)

enterprises. This would also ensure a greater flow of risk capital; bring in the concept of partnership with limited liability.[1]

- ***Recommendations of AbidHussain Committee (1997)***

The 1991 policy for small scale industries had proposed an enactment of a Limited Partnership Act so that it would be easier for SSE entrepreneurs to source additional funding from other partners who could invest in partnership as sleeping partners. Based on this recommendation, the Expert Group recommended that the Limited Partnership Act should be enacted as soon as possible.

It recommended that the proposed Limited Partnership Act should also incorporate the law governing limited management partnerships. These rules should lay down the rights and obligations of the managers and the investors. Since expertise would have to be sought from management companies overseas, the rules for the repatriation of their profits should also be spelt out.[2]

- ***Recommendations of Dr. S.P. Gupta Committee***

The Committee felt that with Indian professionals increasingly transacting with or representing multi-nationals in international transactions, the extent of the liability they could potentially be exposed to is extremely high. Hence, in order to encourage Indian professionals to participate in the international business community without apprehension of being subject to excessive liability, the need for having a legal structure like the LLP is self-evident. Provisions which restrict the number of partners to twenty prevent the growth of professional firms to the large entities operating on an international scale. Such inhibiting conditions have to be removed. Otherwise, Indian

[1] Interim Report of the study group on development of small enterprises, http://web5.laghu-udyog.com/publications/comitterep/gupta.html (last last visited on January 23, 2017)
[2]The Abid Husain Expert Committee Report on Small Scale Industries 1997.

professionals may well get excluded from taking their rightful place in the international community, that their skills otherwise entitle them to.[1]

- ***Recommendations of the Naresh Chandra Committee***

The Naresh Chandra Committee-II that developed the concept of LLP in India observed that "in an increasingly litigious market environment, the prospect of being a member of a partnership firm with unlimited personal liability is, to say the least, risky and unattractive. Indeed, this is the chief reason why partnership firms of professionals, such as accountants, have not grown in size to successfully meet the challenge posed today by international competition. This makes an LLP a most suitable vehicle for partnerships among professionals such as lawyers and accountants."

· Two or more professionals, who wish to associate for the purpose of providing an identified professional service, may subscribe their names in an "incorporation" document in the prescribed form.

· The relations inter se the partners and between the partners and the LLP may be governed by individual agreements between the parties concerned. Such agreement must be filed with the RoC; changes made in the agreement will also have to be filed with the RoC.

· The LLP agreement should contain information as may be prescribed by the Department of Company Affairs.

· No limit be placed on the number of partners in an LLP. Any person may become a partner by entering into an agreement with the existing partners in the LLP. Further, when a person ceases to be a partner of an LLP he/ she should continue to be treated as a partner unless: (a) the partnership has notice that the former partner has ceased to be a partner of the LLP; or (b) a notice that the former partner has ceased to be a partner of

[1]Dr. S.P. Gupta Committee Study Group on Development of Small Sector Enterprises, 2001.

the LLP has been delivered to the RoC. A partner having resigned from an LLP would continue to be liable for acts done by him during his tenure as member of the LLP.

- LLPs should be regulated and administered by the Central Government to ensure uniform standards, and since many of the State Governments might not have adequate infrastructure and expertise for ensuring effective regulation.

- Every partner of the LLP would be an agent of the LLP. However, an LLP would not be bound by anything done by a partner in dealing with a person if (a) the member in fact had no authority to act for the LLP by doing that act; and (b) the person knows that he has no authority or does not know or believe him to be a partner of the LLP.

- Where a partner of the LLP is liable to any person or entity as a result of his wrongful act or omission in the course of the business of the LLP, the LLP would be liable in such circumstances. However, the partner would be liable only to the extent of his/her contribution to the LLP.

- In the event of an act carried out by a LLP, or any of its partners, fraudulently, the liability would not be limited; it would, in fact, become unlimited as provided for in sec 542 of the Companies Act, 1956.

- A partner shall not be liable for the personal acts or misconduct of any other partner.

- The provisions relating to insolvency, winding up and dissolution of companies as contained in the Companies Act, 1956 may be examined and suitably modified to conform to the philosophy of LLPs. The partners may have to contribute to the assets of the LLP in the manner provided for in this regard.

- There should be insurance cover and/or or funds in specially designated, segregated accounts for the satisfaction of judgments and decrees against the LLP in respect of issues for which liability may be limited under law. The extent of insurance should be

known to, and filed with the RoC, and be available for inspection to interested parties upon request.

· The standards of financial disclosures would be the same as, or similar to, that being prescribed for private companies subject to privilege already available between a professional and his or her client in maintaining confidentiality.

· The LLPs should be governed by a taxation regime that taxes the partners as individuals, rather than taxing the LLP itself, i.e., the LLPs should be treated in the same manner as the firm under the tax laws.[1]

- ***Recommendations of the J.J. Irani Committee***

The Dr. J.J. Irani Committee, while recommending the formation of LLPs, pleaded very strongly for the enactment of a separate legislation in this regard. The Naresh Chandra Committee recommended its application to the service industry while the Irani Committee extended its application to the small enterprises also. The Committee opined that "*the service sector is gaining importance by the day, especially professional services such as lawyers, chartered accountants, cost accountants, taxation experts, doctors, etc. In such a situation, to make these professionals globally competitive, the LLP form of business has become a need of the day. This is specially going to help the lawyers and accountants because it will help them to organise their business better and enlarge the number of partners. The original number of partners allowed under the Companies Act is and now it can be increased, so this means expansion of one's operations in one's respective profession. Also, no partner would be liable on account of the independent or unauthorized actions of other partners, allowing individual partners to be shielded from joint liability created by another partner's wrongful business decisions or misconduct*."[2]

The Dr. J.J. Irani Committee on Company law was appointed by the Department of Company Affairs and this Committee too examined the issue of LLP(along with Small

[1]Naresh Chandra Committee Report on Regulation of Private Companies and Partnerships, 2003

Companies) and made the following recommendation: "*In view of the potential for growth of the service sector, requirement of providing flexibility to small enterprises to participate in joint ventures and agreements that enable them to access technology and bring together business synergies and to face the increasing global competition through WTO, etc, the formation of LLPs should be encouraged. It would be a suitable vehicle for partnership among professionals, who are already regulated such as Company Secretaries, Chartered Accountants, Cost Accountants, Lawyers, Architects, Engineers, Doctors, etc. However it may also be considered for small enterprises not seeking access to capital markets through listing on the stock exchange*"[1]. It seems that the LLP Bill gives precedence to the viewpoint of the Irani Committee's observations of extending its applicability beyond the professional services. According to the Naresh Chandra Committee, the scope of LLP should, in the first instance be made available to firms providing professional services, as opposed to trading firms and or manufacturing firms, for several reasons.[2] Firstly, because Indian professional firms are precluded from practicing under any other legal form in view of the restrictions imposed by their respective regulatory laws; trading firms or manufacturing firms, however, have the option to carry on business as a private limited or public company under the Companies Act, 1956. Secondly, as the professionals are also governed and regulated by their respective professional, regulatory bodies, which also control and monitor professional conduct, extending the LLP structure only to professionals minimizes the risk inherent in testing new waters. Thirdly, there is no special advantage that small private companies or Small Scale Industrial (SSI) units would derive from being an LLP, especially in light of the fact that this Committee itself had also simultaneously recommended a considerable easing of regulations on private companies, especially small private companies.[3] It was felt that extending the LLP structure to professionals, in the first instance, would help evaluate its advantages and risks; and based on such evaluation and experience, the LLP form can be considered for extension to small-scale manufacturing and/or trading firms as well in the future. However it must be noted that, unlike the Naresh Chandra Committee report (which had advocated the limitation of the LLP concept initially to only the professional services),

[1]JJ Irani Expert Committee Report on New Company Law 2005.
[2]KR Sampath, "Broad Outline of Limited Liability Partnership Act", 183*CCD*,23.
[3]*Id.*

the Irani Committee had dealt with the issue of LLP in a passing manner, and thus rejecting the detailed recommendations of the Naresh Chandra Committee on this issue does not augur well for the Indian market.[1]

Conclusion

In conclusion, it should be stated that therecommendation of the Naresh Chandra and the DrIrani Committees to introduce LLPs in India has been made with the aim of steering the domestic Indian market towards global integration. Considering the fact that India is progressively making efforts to move up the technological and innovation ladder, and increase its participation in global trade and commerce, the recommendation to introduce LLPs is to be wholly welcomed. The creation of LLPs will add to the variety of business entities available to those wishing to set upbusiness in India. Firms, small businesses and professionals will now have the option of becoming a limited liability entity with the internal flexibility of a partnership. Taking everything into consideration, such a new business environment would only be a positive step for India.

Study of Bride Trafficking in India with Special Reference to State of Haryana[1]

Introduction

In the last few decades, the movement towards bringing an end to slavery and human trafficking is going strong but we still cannot clearly visualize the plight of the victims of trafficking and slavery[2].Trafficking is one of the most indiscriminate crimes happening around the globe affecting all types of people weather rich or poor, boy or girl, black or white, educated or uneducated, married or unmarried, minor or major, disabled or suffering from venereal diseases, beautiful or ugly etc[3].

Understanding bride trafficking is tough because of the scarce literature available on the topic. Bride trafficking in terms of literature is mainly available only in the form of news reports[4]. Most of these reports give details about bride trafficking and its increase. One such report that was published in Hindustan Times News Paper with a title "when women come cheaper than cattle" states that in Haryana, the skewed sex ratio and poverty has resulted in a thriving trade of women who are trafficked from the poverty-stricken areas of Assam, Bihar, West Bengal, Jharkhand, Orissa, Assam and other North-Eastern states[5]. It speaks various instances of violation of human rights of the trafficked brides who are often called as Paros or Molkis. One of the instances shows how a Molki woman who is divorced lives in a pitiable condition in a hut with dogs and human excreta around her and her children.[6]

Trafficking for marriage is a very common phenomenon in which some women are induced with drugs, some are lured for good job and a happy life and some are directly purchased from family

[1] Niteesh Kumar Upadhyay, Research Scholar WBNUJS, Kolkata
[2] OCHR , Human Rights and Human Trafficking http://www.ohchr.org/Documents/Publications/FS36_en.pdf
[3] Human Trafficking : People For Sale, https://www.unodc.org/toc/en/crimes/human-trafficking.html
[4] Kamal Kumar Pandey & Rishi Kant Female Foeticide, Coerced Marriage & Bonded Labour in Haryana and Punjab; A Situational Report
http://www.unodc.org/pdf/india/publications/htvs_miniweb/situational_report_shakti_vahini.pdf
[5] NHRC, A Report on Trafficking in Women and Children in India 2002-2003
http://nhrc.nic.in/documents/reportontrafficking.pdf
[6] *Ibid*.

and guardians promising a happy married life. Bride trafficking is not so simple to understand among all other forms of trafficking. Researcher has found that in other forms of human trafficking organized groups of traffickers are involved whereas in bride trafficking parents, family, brokers, trafficked victims, traffic victim's husband etc., can be a trafficker which makes this crime unstoppable.

Definition of Human Trafficking, Bride trafficking and meaning of word Paro or Molki.

There are various definitions of Human Trafficking provided by National and International Instruments.

According to Indian Penal Code Section 370 lays down that that whosoever for purpose of any kind of explotation, recruits , transports , harbors , transfers or receive a person by using threat , force , coercion , by abduction , by practicing fraud , deception or by inducement by receiving payments or any other benefits commits the offence of trafficking[1].

These trafficked victims are also called with various names like Paro or Molki these words originated in Haryana and are used for the bride trafficking victims. The word means "a woman who is purchased"[2].

Bride trafficking in Haryana is happening since the last few decades[3]. Because of patriarchy and low sex ratio, women are scarce which forces people to look for women for marriage from other states that are poverty stricken. Bride trafficking leads to major violation of human rights of these trafficked victims and needs a multidimensional approach to curb it. The negative effects of bride trafficking are far reaching. It is also an intergenerational problem which forces the next

[1] Indian Penal Code Section 370 Traffciking is : Whoever, for the purpose of exploitation, (a) recruits, (b) transports, (c) harbours, (d) transfers, or (e) receives, a person or persons, by—
First-— using threats, or
Secondly— using force, or any other form of coercion, or
Thirdly— by abduction, or Fourthly— by practising fraud, or deception, or
Fifthly— by abuse of power, or
Sixthly— by inducement, including the giving or receiving of payments or benefits, in order to achieve the consent of any person having control over the person recruited, transported, harboured, transferred or received, commits the offence of trafficking.

[2] Veerendra Mishra , Human Trafficking: The Stakeholders' Perspective Sage Publication 2013 , Page 26

[3] Anu Anand, India's bride trafficking fueled by skewed sex ratios, (July 18, 2017, 8:50 AM), https://www.theguardian.com/global-development/2014/dec/17/india-bride-trafficking-foeticide

generation to follow the trend of facing human rights violations too[1]. Bride trafficking victims are abused physically and mentally on a regular basis but because of marriage, poverty and their children; bear all those atrocities without complaining. Bride trafficking is spreading and increasing in many states and is hard to annihilate as the social acceptability of the practice is high.

In spite of the fact that bride trafficking certainly exists, it is hard to explicitly evaluate the degree and extent of bride trafficking to determine the fate of its illicit character and social worthiness.

Chapter 2: Historical evolution of Paro or Molki concept and reasons behind its acceptance by the society

Every phenomenon or custom has a history behind it, how it develops, how it becomes acceptable to people in general and why it continues even now. There are various traditions and customs due to which people never think that bride trafficking is a crime. The level of social acceptance of some the such traditions and customs is so high that people don't feel bad in following them even though these may appear to be contrary to law of the land, ethics or morality and thus these social evils ensue the acceptance of crime like bride trafficking. Practice of Karewa and bride price are few important factors which we can find almost in all the religions and in all states. The acceptance and treatment of women as commodity has led to increase in crime like bride trafficking.

Bride trafficking can also be seen as practice of Asura marriage[2]. In Asura type of marriage, bridegroom has to give money to the father of the bride. The Smriti writers consider the Asura marriage as a necessary evil or traditional custom. Bride trafficking is not Asura marriage in true sense as it involves element of trafficking allurement, coercion and fraud in it. There are various traditions and customs prevalent in our society which look like bride trafficking but are different

[1] Anu Anand, India's bride trafficking fueled by skewed sex ratios, (July 18, 2017, 8:50 AM), https://www.theguardian.com/global-development/2014/dec/17/india-bride-trafficking-foeticide
[2]Manusmrti, Mention Eight Forms of Marriage, http://www.kamakoti.org/hindudharma/part18/chap5.htm

from it. But what is more significant in their study is the fact that they have created a space for bride trafficking to become acceptable in our society[1].

When the concept of bride trafficking started in India is not clear but we can say that it is as old as the institution of marriage. According to the Punjabi writer Kirpal Kazak, bride selling in Jharkhand[2] (earlier part of state of Bihar) began after the arrival of Rajputs. Because of the economic status of the people of this region, they have to do so. On the day when bride selling will happen, the tribe used to decorate the woman with lot of heavy gold and ornaments and after decoration, the bride was sold. Such practices of bride selling and bride price reduced after green revolution. The spread of literacy and improvement of male-female sex ratio in 1991 reduced the number of bride selling cases around India[3].

Some communities in India still follow the tradition of selling one's daughter for marriage. One can find it in Gandhabaniks community of West Bengal[4]. Gandhabaniks marry their daughters when they are infants, and receive a bride-price (pan) varying according to the social and financial position of the two concerned families. Thus the Gandhabaniks of Bikrampur in Dacca receive a higher price for their daughters and pay a lower price for their wives than members of families whose reputation stands lower for purity of lineage and propriety of ceremonial observances. These kinds of local customs make implementation of anti-trafficking programs a failure because both the bride and groom family accept it and never complain to any state machinery.

Acceptability of custom of Karewa

As per this traditional practice, after the death of husband of woman, she is forced to marry the younger brother of the deceased and in case younger brother is not available then to elder brother provided he is single (unmarried, divorced, or widower). Researcher has seen in the past cases that sometimes even father- in- law of the woman has claimed his right of Karewa on her.

[1]Manusmrti, Mention Eight Forms Of Marriage,http://www.kamakoti.org/hindudharma/part18/chap5.htm
[2]Bride-Purchasing or Bride-Buying, https://www.revolvy.com/main/index.php?s=Bride%20buying&item_type=topic
[3]A Study to Review Sex Ratio at Birth and Analyze Preferences for the Sex of the Unborn, https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3931910/
[4]http://gandhabanik.org/

Bride selling and bride price

Bride selling and bride price word will be used under this thesis interchangeably. 100s of decades back stories around the world in which a girl is sold for marriage or a bride price is paid to girl's father for making his girl available for marriage to a groom. Under this part we will be discussing about some of the few such customs or religious customs of bride price.

Chapter 3: Reasons of bride trafficking

If one wants to learn about bride trafficking, one should first learn reasons behind it otherwise one will never be able to understand this complex social evil, which has even got societal acceptance. People following this practice have no guilt or remorse as they find this to be a win-win situation both for the buyer as well as the seller.

Some of the reasons for bride trafficking are given below

- Quest to get cheap labour
- Land distribution and property ownership
- Bride trafficking as a profitable business
- Low conviction rate in cases of bride trafficking
- Dowry affecting bride trafficking
- Rising levels in women education
- Marriage restrictions and age factor
- Poverty as a main reason for bride trafficking
- Female Foeticide
- Female infanticide
- Inadequate legal proviso and its implementation
- Fear to raise voice

Chapter 4 : Problems faced by bride trafficking victims

Bride trafficking victims face serious of human rights violation during and after the process of trafficking. Trafficking is a continuing human rights issue and trafficking victims face this every

day. In Haryana there are many cases in which women are killed, physically and sexually abused and re-trafficked many times. Domestic violence, discrimination are very common with these trafficked brides. They are discriminated to the extent that no one wants to help them even the police furthermore not only them even their children also face discrimination because they are son/daughters of trafficked bride. Trafficked brides are force to change their religion, name and identity. problems faced by the bride trafficking victims are given below

- Domestic violence
- Rape and other sexual violence
- Forced prostitution
- Undignified life / discrimination
- No property rights to trafficked victims and their off-springs
- Poor living conditions and access to health care
- No right to practice religion
- Restriction on freedom of movement
- Unemployment
- No support for education/higher education
- Frequently divorced, re-trafficked and abandoned
- Forced pregnancy and forced abortions
- Changed identity or no identity proofs of the bride trafficking victims

Chapter 5: Legal Regime related to Bride Trafficking

Bride trafficking involves a series of crimes committed at source, transit and destination stages and there are various laws to protect the trafficking victims from human rights violations. Even after the formulation of many national laws and adoption of various international legal instruments, bride trafficking is at rise. No law at national and international level defines bride trafficking and its essentials.

Bride trafficking in India is prevalent since decades but unfortunately, there are no significant laws to tackle the crime effectively. The Immoral Trafficking Prevention Act, 1956 (hereinafter as, "ITPA") is a special law and focuses on trafficking for commercial sex work (prostitution). ITPA is incompetent to handle human trafficking cases especially for purposes like marriage. There are other legislations like the Bonded Labour System (Abolition) Act, 1976, and Juvenile Justice (Care and Protection of Children) Act, 2000 which are also not well equipped with legal provisions related to human trafficking or bride trafficking. There are Acts like the Goa Children's Act, 2003 which defines human trafficking but even this Act is insignificant in controlling human trafficking.

Trafficking and Constitution of India

Constitution of India under its various provisions prohibits human trafficking. If we closely see, the Preamble of our constitution provides vision to secure `socio-economic justice' to all its citizens with stated liberties: `equality of status and of opportunity', 'assuring fraternity and dignity' of the individual. The bride trafficking victims are also a part of the citizenry hence the preamble directly forces our state to protect these victims from human rights abuses[1].

Article 14 of the Indian constitution provides equality in general which also extends to the human trafficking or bride trafficking victims[2].

Article 15(3) provides for special protective discrimination in favour of woman and children relieving them from the declining formal equality. It states that "nothing in this article shall prevent the State from making any special provision for women and children". This particular article could be of great help because under this article various new polices can be made for rehabilitation, rescue and support of the victims of bride trafficking. This article can provide a great support to the victims of bride trafficking.

Article 21 guarantees right to life and liberty in a dignified sense. Whereas we see that bride trafficking violates the right of the victims to live a life with dignity.

[1]http://www.constitution.org/cons/india/preamble.html
[2] Indian Law institute, New Delhi,http://ili.ac.in/pdf/paper11.pdf

One of the most important and direct provisions of our constitution which affects bride trafficking is Article 23 which prohibits traffic in human beings and forced labour[1]

Directive principle of state policy under Article 38 enjoins the State to secure and protect, as effectively as it may, in a social order in which justice - social, economic and political, shall inform all the institutions of national life. It enjoins, by appropriate statutory or administrative actions, that the state should minimise the inequalities in status and provide facilities and opportunities for equal results. This article is important to preserve the social and economic interest of the bride trafficking victims and directs state made provisions to secure social, economic and political well being of women and children.

Article 46 of Indian constitution directs the state to promote economic interests of women and should also protect these women from social injustice and all forms of exploitation[2]. Trafficking victims face various economic and social injustice especially the bride trafficking victims who are not even treated as victims and are instead taken for granted. The above articles and preamble of the constitution make our state responsible as a guardian of these women and their interest and directs to protect them from all kinds of social and economic injustice. State is trying to curb trafficking but turns out to be a failure if one looks at the number of women who are trafficked annually to India and from India.

The Protection of Human Rights Act, 1993[3]

This act expressively does not provide for protection of trafficking victims but under umbrella terms Human Rights provides protection to all the people whose human rights are violated[4].

[1] Artcile 23 : Prohibition of traffic in human beings and forced labour
(1) Traffic in human beings and begar and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law
(2) Nothing in this article shall prevent the State from imposing compulsory service for public purpose, and in imposing such service the State shall not make any discrimination on grounds only of religion, race, caste or class or any of them.

[2] Article 46 directs the State to promote the educational and economic interests of the women and weaker sections of the ee6people and that it shall protect them from social injustice and all forms of exploitation.

[3] http://ncw.nic.in/acts/TheProtectionofHumanRightsAct1993.pdf

[4] "Human rights" means the rights relating to life, liberty, equality and dignity of the individual guaranteed by the Constitution or embodied in the International Covenants and enforceable by courts in India.

During research the researcher has come to know that there is no state human rights commission (SHRC) in Haryana and hence people have to approach NHRC in Delhi in case of any human rights violations[1].

Immoral Trafficking Prevention Act 1956

India enacted Immoral Trafficking Prevention Act (ITPA) 1956 because of two major reasons. **first reason for enacting ITPA was that India signed and ratified the International Convention on Suppression of Immoral Trafficking and Exploitation of Prostitution of Others in 1995 and due to which India was supposed to make domestic law in consonance of the international[2]. Constitutional** Articles like Article 14, 15, 21, 23 also call for some law to curb human trafficking.

ITPA is a loosely drafted act and does not even contain the definition of human trafficking. The Act majorly deals with trafficking for the purpose of prostitution and sexual exploitation. It does not elaborately and exclusively cover bride trafficking. Furthermore, the Act does not provide any rescue and rehabilitation model or policy for the victims of trafficking.

Trafficking of Persons (Prevention, Protection and Rehabilitation) Bill 2016

In June 2016 this Bill was published and aims to provide India's first comprehensive anti-trafficking law by consolidating all existing laws on Human Trafficking. The current Bill focuses on three key characteristics of trafficking – prevention, protection and rehabilitation.

The Bill focuses on three key aspects of trafficking – "prevention, protection and rehabilitation of victims." The bill discusses in detail about registration of placement agencies, creation of Anti-trafficking funds etc. but fails to give extensive definition of human trafficking. Bill has not provided any definition of human trafficking due to which a lot of cases and situations like bride trafficking go unpunished. This bill lacks a multi-faceted long term commitment to abolish Human Trafficking. Rehabilitation is just talked about and no concrete system of rehabilitation

[1] Status of Women Human Rights in Haryana: A Critical Analysis,http://shodhganga.inflibnet.ac.in/bitstream/10603/51316/9/09_chapter%205.pdf
[2]http://www.ohchr.org/EN/ProfessionalInterest/Pages/TraffickInPersons.aspx

has been discussed in the drafted bill. Therefore even if the present bill is passed it will not make much difference in the life of the trafficked brides.

THE JUVENILE JUSTICE (CARE AND PROTECTION OF CHILDREN) ACT, 2000.

As most of the bride trafficking victims are trafficked at an age below 18 years the Juvenile Justice Act (JJ Act) plays an important role in protecting the trafficking victims. The focus of this Act is to provide proper care and protection to the children below the age of 18 years who are in a conflict with laws or care and protection by the laws. If juvenile justice Act provisions are properly implemented then providing rehabilitation to the victims of bride trafficking is comparatively easy. The Act under Section 29 empowers the state government to constitute CWC (Child Welfare Committee). CWC is mandatory to protect and take care of children who are in a conflict with laws or who are in need of care and protection by the laws. Section 34 provides for establishment of children homes for care and protection of children.

INDIAN PENAL CODE, 1860.

Since the last few decades, even when the definition of trafficking is not well known, IPC is providing provisions to punish the crime of trafficking and other criminal acts associated with it. Bride trafficking victims not just face trafficking but also a lot of other crime for which IPC provides definitions and punishments. There are at least 20 provisions that are linked to trafficking. Under the IPC a trafficked girl child has been subjected to a multitude of violations for example being sold by someone (sec 372), bought by someone (Sec 373), outraging her modesty (354, 354A, 354B, 354C,, 354D), rape, gang rape, repeated rape (Sec 375), subjected to perverse sexual exploitation (Sec 377)[1]. There are many such provisions which protect trafficked victims and also the victims of bride trafficking.

The most important section which can directly affect bride trafficking victims is Section 366 of Indian Penal Code which deals with provisions of kidnapping, abducting or inducing a woman to

[1]http://jajharkhand.in/wp/wp-content/uploads/2017/01/05_human_trafficking.pdf

compel her for marriage. This provision is one of the most misused provisions and is usually evoked in cases of love marriage. Lot of arrest cases are registered under these sections which has nothing to do with forced marriage, but they deal with the aspect of elopement. If Section 366 of IPC is used properly to control bride trafficking, we do not need any other specific legislation for bride trafficking but the Section fails to understand the plight of the trafficking victims who directly fall under this particular section.

Goa Children's Act, 2003[1].

Goa Children's Act is the first Act which tries to define child trafficking in India. According to the Act, child trafficking means:

"child trafficking" means the procurement, recruitment, transportation, transfer, harbouring or [receipt of children] legally or illegally, within or across borders, by means of threat or use of force or other forms of coercion, of abduction, of fraud, of deception, of the abuse of power or of a position of vulnerability or of giving or receiving payments or benefits to achieve the consent of a person having control over another person, for monetary gain or otherwise.

This Act is only applicable to the state of Goa and hence its significance is very low as the jurisdiction of the Act is limited. Furthermore, it only deals with trafficking of children which reduces its jurisdiction on cases related to other forms of trafficking or bride trafficking.

The Child Marriage Restraint Act, 1929[2].

As a lot of victims who are trafficked are children, this Act provides a framework which may help in combating trafficking of children for the purpose of child marriage.

Section 12[3] of Child Marriage act provides provision which can curb bride trafficking of girls below the age of 18. This section deals with situation of bride trafficking of minors and declares the marriage null and void

[1]https://www.childlineindia.org.in/CP-CR-Downloads/Goa%20children's%20act%20and%20rules.pdf
[2]http://chdslsa.gov.in/right_menu/act/pdf/childmarriage.pdf
[3]Section 12 child marriage act :
Marriage of a minor child to be void in certain circumstances.-Where a child, being a minor--
(a) is taken or enticed out of the keeping of the lawful guardian; or"
(b) by force compelled, or by any deceitful means induced to go from any place; or

Chapter 6: Suggestions to curb bride trafficking from Haryana

Before discussing suggestions by the researcher, researcher will like to discuss some of the suggestions given by Supreme Court in leading case of Gaurav Jain v. Union of India and Others. Supreme court directed to provide self-employment, training in weaving, knitting, painting and other meaningful programs to provide the fallen women the regular source of income by self-employment or, after vocational education, the appropriate employment generating schemes in governmental, semi-governmental or private organizations.

Supreme court also acknowledged the involvement of the non-governmental organisations, in particular women organisations in the care, protection and rehabilitation of prostitution victims and children of the fallen women.

The Court directed to constitute a committee within a month from the judgment consisting of the Secretary in charge of Department of Women and Child Development as the chairperson and three or four Secretaries from the concerned State Governments to make an in-depth study into these problems and evolve such suitable schemes as are appropriate and consistent with the directions given . A permanent Committee of Secretaries should be constituted to review the progress of the implementation on annual basis, and to take such other steps as may be expedient in the effective implementation of the schemes.

(1) <u>Active role of civil society organization in rescue and rehabilitation of trafficking victims:</u>

There are a lot of instances seen in the past in which due to the active role of civil society organization human trafficking was curbed and victims were rescued.

(c) is sold for the purpose of marriage; and made to go through a form of marriage or if the minor is married after which the minor is sold or trafficked or used for immoral purposes, such marriage shall be null and void.

(2) Police advocacy is an important intervention that has to be fine-tuned[1].To curb the issue of bride trafficking in Haryana there is a need for exchange of knowledge regarding best practice to curb human trafficking or bride trafficking.

(3) Programs at a large scale should be conducted especially by SP/DCP to sensitize police officers about probable cases of human trafficking. Furthermore in all cases where safe return of a trafficking victim is not possible, proper arrangements should be made that should protect rights and dignity of these trafficked women. These trafficked victims are not prostitutes or criminals and so police should do their work and conduct themselves in a dignified way.

(4) Repatriation and reintegration of the survivor into the community

Most of bride trafficked victims are lured for marriage or better jobs and they develop a stigma that society and family will not accept them and so they never want to repatriate to their villages and family. Family also in most of the cases shows hostile behaviour towards the trafficking victims and this unwelcoming behaviour makes the condition of these bride trafficking victims even more vulnerable. There are many women who do not want to go back to their family because of chances of violence towards them and some of these women are forced to follow this condition which makes their repatriation impossible.

(5) Strict Laws to punish traffickers

We need strict laws to punish persons who abuse and exploit the trafficking victims. Law should also ensure that these trafficking victims are treated properly and are not mal treated by police or any other government agencies. There are a few cases reported to the researcher by the trafficking victims where they narrate the horrific story of their escape from their so called 'husband family' and how they are brought back to the same family by the police.

(6) Campaigns to Raise Trafficking Awareness

[1]http://www.india.gov.in/allimpfrms/alldocs/12262.pdf

More and more Campaigns for raising trafficking awareness are needed and distributing leaflets and other informational material can do this. Legal aid societies of different law schools can also contribute through their legal awareness programs about bride trafficking especially in source and destination area. These legal aid societies will be very useful as most of them will be familiar with the local language and local situations. Legal aid committees of Law University may also help in promoting awareness about bride trafficking and human rights issues related to it. The campaigns should be conducted both at source and destination places, people in Bihar, Orissa and Bengal should be told about human rights violation of their daughters and sisters in state of Haryana after trafficking, awareness campaign can also discuss in detail about the modus operandi of bride trafficking and how people can save themselves from it whereas campaigns in the destination state (Haryana) should focus more on female feticide, women rights and punishment for trafficking. These campaigns will surely put a limit on the number of bride trafficking victims in state of Haryana.

(7) Legislative Amendments in the ITPA

Bride trafficking is a new form of human trafficking or better say it's a human trafficking for the purpose of marriage. Often, marriage appears to be an easy instrument for trafficking women. Bride trafficking is kind of forced sale or buying, resale of girls and women for the purpose of marriage. As far as trafficking victims are concerned the Government enacted the Suppression of Immoral Traffic in Woman and Girls Act, 1956 in pursuance of its commitment on ratifying the International Convention for the Suppression of the Traffic of Persons and of the Exploitation of the Prostitution of others signed at New York on 9th May, 1950. The Act was later amended to be known as the Immoral Traffic (Prevention) Act, 1986 (hereinafter referred as ITPA)[1]. On the legal front, ITPA by its name, is the legislative enactment in India entirely dedicated to the acts of trafficking apart from the Indian Penal Code which in detail have many provisions

[1]Bride Trafficking in India: 21st Century Slavery Human Rights on Campus (Dec 2012)

which deals with the different aspects of human trafficking. ITPA have many provisions which deal with immoral trafficking or in particular trafficking for the purpose of prostitution and sexual exploitation but does not deal with other kinds of human trafficking. ITPA act is clearly insignificant to discuss different kinds of trafficking and provisions for the same.

(8) Source or poverty stricken area residents should be taught clearly about human trafficking and bride trafficking and Panchayati Raj Institutions can play a dominating role in creating awareness among people about bride trafficking and human trafficking. Gram Sabha and other organizations can be very useful to disseminate awareness about human trafficking.

(9) Due weightage should also be given to awareness campaigns against female feticide which is one of the major cause for bride trafficking in Haryana.

(10) Various schemes of the government should be implemented properly. There are various schemes and measures that government has taken to curb the exploitation of trafficking victims and children as we have seen majority of the cases of bride trafficking involves minor girls. Government of India has launched an ambitious comprehensive scheme called the “Integrated Child Protection Scheme

(11) Improving literacy and adult education with emphasis on sex education and gender sensitive concerns will reduce the vulnerability of poverty stricken and illiterate people towards trafficking.

14. Strengthening through capacity building programs, the competency of anti-trafficking agencies to arrest, gather evidence and prosecute those involved in bride trafficking. Further help can be sought by setting up of a national database of all traffickers involved in bride trafficking business. Researcher has gone through various training modules and

has observed that these training modules and manuals do not talk about bride trafficking and trafficking for the purpose of marriage[1].

(12) A robust police and prosecution system is needed which will insure that all human traffickers are arrested, prosecuted and punished with the most stringent punishment possible and which should also include penalties for wrong deeds.

Post trafficking rescue and rehabilitation:

Post bride trafficking there are two types of victims: one who wants to stay in the forced marriage and other who wants to get out of it but has no means to do so. Bride trafficking victims of both types need support from state and government but the nature of support needed is different.

***For women who want to come out of the trafficked marriage*:**

(1) Economic support
(2) Vocational training
(3) Physiological support
(4) Rehabilitation facilities
(5) Education for children
(6) Maintenance from the husband

***For women who do not want to come out of the forced marriage alliance*:**

(1) Vocational training
(2) Legal provision for property right

[1] Government of India , Manual for Training Police on Anti Human Trafficking https://www.unodc.org/pdf/india/training_manual_police1.pdf see also Government of India, Training Manual for Prosecutors On Confronting Human Traffickinghttp://www.unodc.org/pdf/india/training_manual_prosecutors1.pdf , http://ncw.nic.in/pdfFiles/Advisory-on-HTrafficking-150909.pdf ,

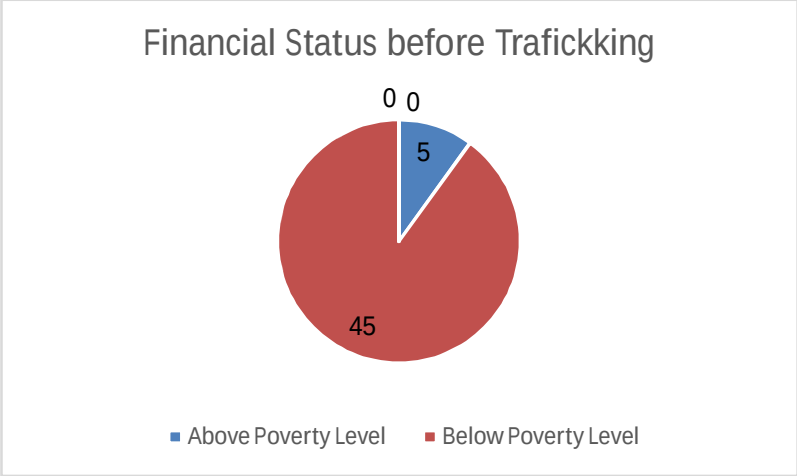
(3) Awareness about domestic violence and sexual abuse

(4) Support regarding creation of documents such asadhaar card and voter id card

(5) Creating self-help groups

Chapter 6: Conclusion

Poverty and female feticide remains the major cause for trafficking of brides in Haryana. Researcher took interview of 50 trafficking victims and out of them 45 replied that they were below poverty line before trafficking. Poverty is the root cause of people selling their girls to traffickers and grooms in Haryana. Researcher also found that it is not just the trafficked bride's family who is poor but also the family who purchases them is very poor.

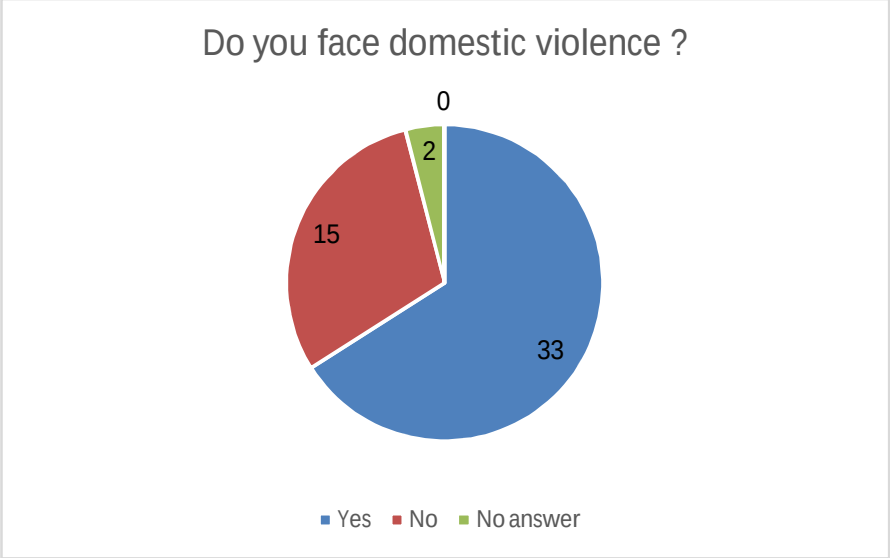


Researcher through empirical research also found the post trafficking living standard of the trafficking victims and the results were shocking. Most of these victims live in a 'kaccha' house which shows their miserable condition of living. This shows that people selling their daughters as well as people who are buying brides are poor.

Bride trafficking victims after reaching Haryana see a world which was not at all promised for. Most of the trafficked brides after reaching Haryana find that their husbands are already married or divorced, or over aged or differently abled and in some cases who is the husband is not known

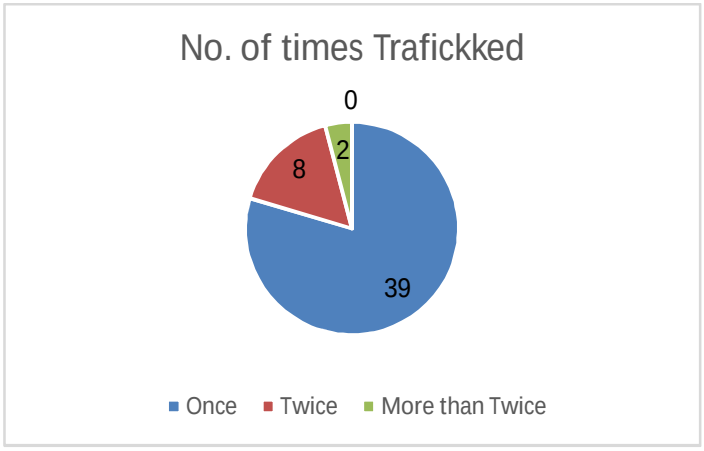
altogether because the bride has to cohabit with multiple males of the family. Trafficked brides are shared among brothers, uncles and some times even with the father-in-law. Trafficked brides not just face this kind of human rights violation post trafficking but are also constantly discriminated in the society and family. Trafficked brides face various kinds of other human rights violations pre and post trafficking. These women are raped by traffickers, middle man and of course by the family of her so called husbands. They also face domestic violence at regular intervals and 66% of women who were interviewed by the researcher revealed that they face domestic violence.

Do the trafficked bride face domestic violence



Trafficked brides are sometimes forced for commercial sex work also because the husbands want to rest at home and get easy money . Sometimes the husbands purchase brides for some time and after having their sexual desires fulfilled, send them back to the trafficker. Again they are sold to another man for a price higher than what she was sold for the first time. Re-trafficking of trafficked brides is a very common phenomenon and some of the victims are trafficked even more than 3 times. This way these women become a good investment for the husbands as they fulfill sexual desires also and when the husband is bored he can sell her to someone and get a new bride for himself maybe at a lesser price. 10 trafficked brides out of 50 said that they were trafficked more than once.

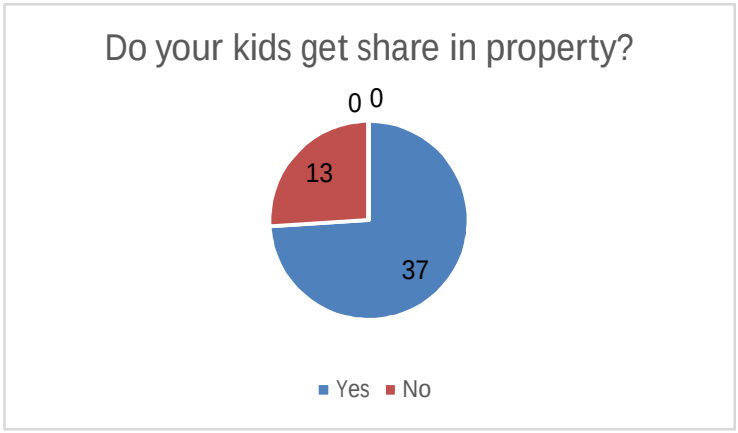
Number of times a trafficked bride is trafficked in Haryana



Some of the trafficked brides are only purchased to give birth to a male child and as soon as that motive is fulfilled she is sold again to some other person. Researcher has also found in some cases that if the trafficked bride gives birth to girl child she is thrown out of the family along with her daughter. Trafficked brides are abused as child producing machines and have no freedom to choose when and how many times they want to give birth to children. Trafficked brides quite often face forced pregnancy and forced abortions.

Bride trafficking victims are often discriminated and so are their offspring. These women are called as 'Paro' or 'molki' and have no respect in Haryana. Their children are also called “paro’s son or paro’s daughter”. A lot of these trafficked victims are forced to change their name, identity and religion. These trafficked brides are not given a status equal to or same as the local wives and their children also face discrimination in the family, schools and society. Children of trafficked brides are not offered any share in the property and remain property less. As these women and children have no property and are purchased, noone gives them their daughter for marriage.

Children right on Property of father



Finally when these trafficked brides do not find a girl for their sons in the same state, they seek the help of some traffickers they know and get a bride trafficked for their son from some other state.This adds to an increase in this trafficking business and also makes it difficult to stop. This way once the brides who were on the supply side shift to the demand side for their children and so bride trafficking passes on from generation to generation.

The biggest challenge trafficked brides face is the attitude of the society and law enforcement officers. When these women approach the society or police for any kind of support they are neglected and never taken seriously. In case of Sakina (name changed) who was recused by Bachpan Bachao Andolan with the help of police there is clear mention of how hostile police officers behaved with the victim as well as her brother who was repeatedly abused by police officers. Her brother already approached police long time back to ask for Sakina's rescue from the forced marriage but the police officers refused to help. It was only when Bachpan Bachao Andolan people intervened that the police became ready to help. Police kept on posing questions to Bachpan Bachao Andolan staff, saying how could they rescue Sakina form the custody of her legally married husband. Whereas Sakina was trafficked and was less than 18 years of age when her brother asked the police to help him rescue her . In the recent case of rescue of Sakina we also find that around 200 armed villagers tried to stop the police to perform the rescue operation which clearly shows the attitude of society towards the bride trafficking victims .

There are various national and international laws which may help in curbing bride trafficking but

due to corruption and insensitivity of the society towards trafficking victims these laws are never properly implemented. Researcher has also found that mostly national legislations like ITPA 1956 , IPC etc define human trafficking but do not define bride trafficking or trafficking for the purpose of marriage. As there is no definition of this crime it largely remains misunderstood. ITPA 1956 needs amendment to protect bride trafficking victims from being trafficked and should also provide rehabilitation and rescue faculties to the trafficked brides.

Sexual intercourse with the wife under 18 years in now criminalized in India which will help nab people involved in the trafficking of minors as most of the victims trafficked are minors. If the ITPA act is not able to punish the purchaser, the Indian penal code can do so. Bride trafficking of adult women is still of concern as no parallel legislation can provide support to trafficked brides above age of the 18 years. To control bride trafficking strict implementation of POSCO Act, 366 and 370 of IPC and child marriage prohibition act is important. As 60% of the trafficked brides are trafficked at the age less than 18 years implementation of Child Marriage Act and POSCO will be very useful.

Most of these trafficked brides are sold by their own family members and relatives. They are sold to uneducated, unemployed, old, fragile, divorced husbands. Sometimes the details about the husbands are not given to the bride's family or the bride but in some cases family member’s malafidly marry their daughters to such people in the quest of easy money. During Interview with the para legal volunteer Mohammad Ajmal, a shocking incidence was revealed in which a father sold her 18 year old daughter to a 67 years old man in Haryana for marriage purpose knowing that his daughter's groom is so old and might die soon leaving his daughter a widow. As expected, the husband was quite old and was dead after sometime and the daughter returned back to her father’s place. Then her father sold her again to a person who was 47 years of age and again acquired money easily. When inquired why would he do so, Ajmal replied that the father wanted money and the older the groom is the sooner he would die and sooner the father would get a chance to resale his daughter.